No. 91-5771-CFY
Status: GRANTED

Title: Harold Ray Wade, Petitioner
v.
United States

Docketed:
September 10, 1991

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Martin,J. Matthew

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 10 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Oct 11 1991		Order extending time to file response to petition until November 14, 1991.
5	Oct 31 1991		Brief of respondent United States in opposition filed.
6	Nov 7 1991		DISTRIBUTED. November 27, 1991
7	Dec 2 1991		REDISTRIBUTED. December 6, 1991
9	Dec 9 1991		Petition GRANTED.
			**********
10	Dec 30 1991	G	Motion of petitioner for appointment of counsel filed.
11	Jan 13 1992		Motion for appointment of counsel GRANTED and it is ordered that J. Matthew Martin, Esquire, of Hillsborough, North Carolina, is appointed to serve as counsel for the petitioner in this case.
12	Jan 13 1992		Joint appendix filed.
13	Jan 23 1992		Brief of petitioner Harold Wade filed.
14	Jan 23 1992		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
15	Jan 27 1992		Record filed.
		*	Certified record U.S. Court of Appeals, Fourth Circuit and U.S. District Court, N.C. (1 SEALED ENVELOPE)
16	Jan 31 1992	D	Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
20	Feb 5 1992		SET FOR ARGUMENT MONDAY, MARCH 23, 1991. (2ND CASE).
18	Feb 21 1992		CIRCULATED.
17	Feb 24 1992		Motion of National Association of Criminal Defense Lawyers for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument DENIED.
19	Feb 25 1992	X	Brief of respondent United States filed.
21	Mar 13 1992	X	Reply brief of petitioner Harold Wade filed.
22	Mar 23 1992		ARGUED.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HAROLD RAY WADE, JR.,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW, the Petitioner, by and through his undersigned counsel of record, pursuant to the provisions of Rule 39 of the Rules of the Supreme Court of the United States and respectfully prays the Court that he be given leave to proceed in this Court in forma pauperis. In support of such motion, the undersigned respectfully shows unto the Court as follows:

(1) The undersigned was appointed to represent the Petitioner pursuant to the provisions of the Criminal Justice Act of 1964, as amended, by the United States Court of Appeals for the Fourth Circuit.

(2) The undersigned has been directed by the Petitioner, pursuant to the provisions of I.O.P. 46.3 of the United States Court of Appeals for the Fourth Circuit, to prepare and to file a petition for a Writ of Certiorari with this Court.

(3) The Petitioner has been previously adjudicated to be indigent.

91-5771

WHEREFORE, the Petitioner respectfully prays the Court that he be allowed to proceed in forma pauperis.

This the 10th day of September, 1991.

J. Matthew Martin
Attorney for Petitioner
Harold Ray Wade, Jr.

OF COUNSEL:
Martin & Martin, P.A.
102 North Churton Street
Hillsborough, N.C. 27278
(919) 732-6112

91-5771

NO.

IN THE

Supreme Court of the United States

October Term, 1991

No. _____

HAROLD RAY WADE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. Whether a Federal District Court has the power to review the United States Attorney's decision not to file pleadings pursuant to Section 5K1.1 of the Sentencing Guidelines for a downward departure at sentencing even to determine whether such decision is based upon arbitrariness or bad faith?

PARTIES TO THE PROCEEDING:

Harold Ray Wade, Jr.,

Petitioner

United States of America,

Respondent

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United States v. Wade, 936 F.2d 169 (4th Cir. 1991) is reprinted in the appendix hereto.

GROUNDS FOR JURISDICTION

The decision of the Court of Appeals for the Fourth Circuit was issued on June 12, 1991.

No motion for rehearing was filed. There have been no motions submitted to this Court for extension of time within which to file this Petition for Writ of Certiorari.

Jurisdiction to conduct the requested review is conferred upon this Honorable Court by 28 U.S.C. Section 1254 (1).

STATUTES AND GUIDELINES INVOLVED IN THIS CASE

18 U.S.C. Section 3553(e) provides as follows:

Limited authority to impose a sentence below a statutory minimum
Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

28 U.S.C. Section 994(n) provides as follows:

The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Policy Statement 5K1.1, United States Sentencing Commission Manual provides as follows:

Section 5K1.1 Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

Alamance County, North Carolina authorities arrested the petitioner, Harold Ray Wade, Jr., on October 30, 1989, after a search of his home and out-building disclosed drugs and guns. The petitioner immediately began cooperating with the law enforcement officials, both State and Federal. The results of this cooperation were fruitful, resulting in the identification and capture of co-conspirators as well as in the identification and investigation of unrelated drug offenses and offenders. The Grand Jury for the Middle District of North Carolina returned a four count indictment against the petitioner on November 28, 1989, charging in count one conspiracy to possess with intent to distribute cocaine, in violation of Title 21 U.S.C. Section 846. Count two charged possession with intent to distribute cocaine, in violation of Title 21 U.S.C. Sections 841(a)(1) and (b)(1)(B). Count three charged distribution of cocaine, in violation of Title 21 U.S.C. Sections 841(a)(1) and (b)(1)(C). Count four charged the use and carrying of a firearm in relation to the drug trafficking crime pursuant to Title 18 U.S.C. Section 924(c)(1).

The petitioner entered pleas to all counts on March 5, 1990, and March 7, 1990. The Presentence Report delivered to the court noted the immediate and total cooperation of the petitioner. Nonetheless, despite the fact that the petitioner's cooperation was made voluntarily and within a matter of minutes following his arrest, it was done without a plea bargain agreement. Ultimately, the government neither filed a motion pursuant to Section 5K1.1 of

the Federal Sentencing Guidelines nor otherwise commented on the petitioner's cooperation at sentencing.

On May 11, 1990, the district court held a sentence hearing, but would not allow the petitioner to address the court with regard to the issue of his cooperation with law enforcement officers in the context of a downward departure. The district court sentenced the petitioner to the minimum mandatory sentence: 120 months followed consecutively by 60 months. The court informed the petitioner that it was of the opinion that it had neither the authority to hear such evidence nor the power to depart downward in the absence of the government's pleadings pursuant to Section 5K1.1 of the Federal Sentencing Guidelines. "Well, I believe I'm going to let you make some law with that case because I do not believe so, and I hold I do not have that authority. You may appeal that belief that I feel I would--that I am opposing this sentence contrary to law because I don't believe that I can depart upon your motion for substantial assistance below the mandatory minimum." (Transcript pp. 5-6)

On June 12, 1991, the United States Court of Appeals for the Fourth Circuit affirmed the ruling of the district court and held that absent a governmental motion for downward departure pursuant to Rule 5K1.1 of the Federal Sentencing Guidelines, the district court has absolutely no authority to look into government's reasons for its refusal to move for downward departure and may not, on its own depart downward.

> **absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence for the substantial assistance of the defendant, and the defendant is not entitled to an explanation for the government's refusal to make the motion or for its refusal to enter into an agreement to make the motion.**

United States v. Wade, 936 F.2d 169, 173 (4th Cir. 1991).

REASONS FOR GRANTING WRIT

The district courts' interpretation of Section 5K1.1 of the Federal Sentencing Guidelines directly affects the relationship between the court and the parties at sentencing for many cooperating defendants. A split in the circuits has recently developed on the issue of whether a district court has the right to review the government's decision not to move for a downward departure in sentencing. As noted, the Fourth Circuit Court of Appeals has ruled that a defendant may not question the governnment's refusal to move for a departure under Section 5K1.1, and the district court may not grant a departure in the absence of such a motion. United States v. Wade, 936 F.2d 169 (4th Cir. 1991).

Other circuits have agreed. United States v. Huerta, 878 F.2d 89 (2nd Cir. 1989), cert. denied __ U.S. __, 110 S.Ct. 845, __ L.Ed.2d __ (1990), See also, United States v. Severich, 976 F.Supp. 1209 (S.D. Fla. 1988), aff'd, 872 F.2d 434 (11th Cir. 1989); United States v. Romolo, 937 F.2d 20 (1st Cir. 1991); United States v. Long, 936 F.2d 482 (10th Cir. 1991). Conversely, four other appellate courts have recognized the district court's power to

review the government's decision not to move for a downward departure in sentencing, at least in certain circumstances.

In an equally divided en banc decision, the Eighth Circuit in United States v. Gutierrez, 908 F.2d 349 (8th Cir. 1990) held that "section 5K1.1 does not limit courts from considering a defendant's assistance to authorities and granting a downward departure from the Guidelines range for such assistance." Id. at 355. Furthermore, it said "that the defendant provided assistance warranting departure is a finding of fact reviewable under the clearly erroneous standard." Id. Although the rules of the Eighth Circuit provide that an equally divided en banc ruling has no value as precedent, the clear trend in that Circuit by virtue of Gutierrez is to look into the circumstances of a defendant's assistance in the context of section 5K1.1, of the Sentencing Guidelines when appropriate to consider whether the government's refusal was unreasonable. Accord United States v. Smitherman, 889 F.2d 189, 191 (8th Cir. 1989), cert. denied, __ U.S. __, 110 S.Ct.1493, 108 L.Ed.2d 629 (1990); United States v. Justice, 877 F.2d 644, (8th Cir.), cert. denied, __ U.S. __, 110 S.Ct. 375, 107 L.Ed.2d 360 (1989); United States v. Hubers, 938 F.2d 827 (8th Cir. 1991) (examining the circumstances surrounding the cooperation for bad faith or arbitrariness).

The reasoning of this line of thought has been persuasive:

> This case is therefore similar to the Justice case in which the Eighth Circuit, in affirming the refusal to depart, observed that the defendant did receive some benefit as a result of his cooperation--in that case from a plea bargain to a lesser charge. Accordingly, we conclude, as

> the Eighth Circuit did in Justice, that while there may be extreme situations in which the defendant's reliance on the government's inducements may permit a downward departure in the absence of a government motion, this is not such a case. A departure based exclusively upon cooperation with the government in this case would have amounted to unwarranted interference with the discretion committed to the prosecution under section 5K1.1 See United States v. Ayarza, 874 F.2d 647, 652 (9th Cir. 1989), cert. denied, __ U.S. __, 110 S.Ct. 847, 107 L.Ed.2d 841 (1990) (section 5K1.1 intended to "lodge some sentencing discretion in the prosecutor").

United States v.Mena, 925 F.2d 354, 356 (9th Cir. 1991). Thus, it appears the Ninth Circuit has held that a district court could depart downward in a sentence without the government's motion, if the government exercised bad faith in refusing to move for departure, or was arbitrary in its decision-making process, in evaluating and considering the defendant's assistance.

Recently, the District of Columbia Circuit in United States v. Doe, 934 F.2d 353 (D.C.Cir. 1991) held that the District Court erred in reviewing a decision not to depart under the arbitrary and capricious standard, and then noted:

> It does not follow, however, that all review of a prosecutor's decision not to move for departure should be precluded. Rather, we believe that limited review would be available under the same standards currently employed by district courts to review other matters committed to prosecutorial discretion.

Id. at 361. Moreover, the court said,

> Despite the broad latitude traditionally accorded to prosecutors regarding matters within their unique competence, . . . courts will intervene where a prosecutor attempts to penalize a defendant for exercising his legally protected rights, . . . or where the prosecutor bases his decision 'upon an unjustifiable standard such as race, religion, or other arbitrary classification.' . . . In addition to reviewing a prosecutor's actions for vindictiveness or

> invidious selectivity, courts will also ensure that the government honors contractual commitments with defendants. . . . We deem these limited principles of review equally applicable to the government's exercise of its discretion under section 5K1.1 to move for departures.

Id. (citations omitted); cf. United States v. Conner, 930 F.2d 1073 (4th Cir. 1991); United States v. Daniels, 929 F.2d 128 (4th Cir. 1991); United States v. Rexach, 896 F.2d 710 (2nd Cir. 1990) (holding that the decision of the government not to move for a downward departure is reviewable under principles of contract law when the talisman of Section 5K1.1 is invoked within a plea agreement).

The Fifth Circuit has noted, "Congress directed the Commission to 'assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed... to take into account a defendant's substantial assistance in the investigation of prosection of another person who has committed an offense.'" United States v. White, 869 F.2d 822, 828 (5th Cir.) cert. denied, ___ U.S. ___, 109 S.Ct. 3172, 104 L.Ed. 2d 1033 (1989). (Citing 28 U.S.C. Section 994(n)). In construing the policy statement of section 5K1.1 of the guidelines, the White Court held, "This policy statement obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such assistance." Id. at 829.

To rule otherwise, that the prosecution's reasons for refusing to move for departure, in spite of the defendant's documented diligence, are forever shuttered from review, would violate due

process.

> When a defendant has rendered substantial assistance to law enforcement but the government refuses to file the requisite motion, the sentence the Court is required under law to impose will not be based on true and accurate information: those factors that, because of the cooperation, would call for a reduction in the otherwise mandatory sentence will not be before the Court, and the Court will have to sentence as if the defendant had not rendered such assistance. The defendant is also precluded from questioning the proceedings leading to the imposition of the sentence or the facts relied on by the prosecution. Indeed, under the construction of section 3553(e) of Title 18 and section 5K1.1 of the guidelines espoused by the government, the prosecution could arbitrarily or for an unconstitutional reason (e.g., racial or sex discrimination) decide not to file the motion called for by these provisions, and the court could not intervene even if the defendant were able to demonstrate to it--should he be able to reach the ear of a court--that he had rendered massive assistance to law enforcement, to the point where his safety or even his life are in serious jeopardy...
>
> It is difficult to conceive of a parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry by anyone.

United States v. Roberts, 726 F.Supp. 1359, 1374-1375 (D.D.C. 1989), see also United States v. Curran, 724 F.Supp. 1239, 1241-1245 (C.D.Ill. 1989).

Although no other circuits have found Section 5K1.1 of the Federal Sentencing Guidelines unconstitutional upon its face, one-half of the Eighth Circuit in Gutierrez said, "[i]f section 5K1.1 is interpreted to limit the courts to departure only on a motion

by the government, I would find that limitation to be fundamentally unfair and a violation of due process." Gutierrez, 908 F.2d at 354 (Heaney, J. dissenting). If nothing else, this is at least evidence of the changing attitude of at least one appellate court to the strictures of Section 5K1.1. One circuit has deferred the questions of the court's role in circumstances where bad faith or arbitrariness allegations are present until another day. United States v. Levy, 904 F.2d 1026, 1036 (6th Cir. 1990), cert. denied sub nom., Black v. United States, __ U.S. __, 111 S.Ct. 174, 112 L.Ed.2d 1060 (1991).

Unless the federal courts are given the power to review the government's reasons for refusing to make a motion for downward departure in sentence after a defendant has provided substantial assistance, there would be no check on the government's authority. The unfettered ability of the government to decide at whim whether to move for a downward departure in sentencing, without the check of judicial review, might result, by accident or purpose, in arbitrariness, in bad faith, or in other prosecutorial misconduct. cf. United States v. Wade, 936 F.2d 169 (4th Cir. 1991) with United States v. Hubers, 938 F.2d 827 (8th Cir. 1991) (both cases affirmed refusal to depart downward, but the Hubers court inquired into the circumstances of the cooperation, imparting an aura of fairness by subjecting all parties to the supervision of its review).

Different United States Attorneys' offices have different methods of evaluating a defendant's assistance: some use what is called a "departure committee," whose actions are done in secret.

At sentencing in Greensboro, the court did not allow any inquiry on the record as to the decision making process in the Middle District of North Carolina in general, or in this case in particular.

This court has held that the broad delegation of powers to the prosecution within the guidelines is constitutionally permissible under the separation of powers doctrine. United States v. Mistretta, 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Nonetheless, the trial court retains the jurisdiction to address the conduct of those who appear in front of it in criminal cases. United States v. Lopez, 765 F.Supp. 1433 (N.D.Cal. 1991). To hold that the court lacks like powers in the guideline context, would handcuff the judge. In essence, the system of checks and balances upon which the government is predicated would be in jeopardy.

Given the split in the circuits on the question of whether the court can review a prosecutorial decision to not move for departure from the sentence under the Federal Sentencing Guidelines, it is important that this question be considered and that this Court exercise its power of supervision over the lower federal courts in administering the application of the policy statement contained in Section 5K1.1.

Undoubtedly, the Federal Sentencing Guidelines altered substantially the nature of the sentencing process in the United States District Courts. The Guidelines have left unresolved questions regarding the new relationship between the government and the Courts. This case presents an opportunity for this Honorable

Court to issue crucial guidance to all involved with regard to when, if ever, the trial court may investigate the circumstances regarding the government's refusal to move for departure pursuant to Section 5K1.1 and to what, if any, remedial action may be taken should circumstances warrant, thereby resolving a growing disparity of decisions among the Circuits.

CONCLUSION

For the foregoing reasons this Petition for the Writ of Certiorari should issue.

Respectfully submitted,

J. Matthew Martin
Counsel for Petitioner
Harold Ray Wade, Jr.

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5805

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

HAROLD RAY WADE, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Norwood Carlton Tilley, Jr., District Judge. (CR-89-278-G)

Argued: February 8, 1991 Decided: June 12, 1991

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Niemeyer wrote the opinion in which Chief Judge Ervin and Judge Spencer joined.

ARGUED: J. Matthew Martin, MARTIN & MARTIN, P.A., Hillsborough, North Carolina, for Appellant. Richard S. Glaser, Jr., Assistant United States Attorney, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Robert H. Edmunds, Jr., United States Attorney, Charles T. Francis, Assistant United States Attorney, Michael J. Russo, Third Year Law Student, Greensboro, North Carolina, for Appellee.

NIEMEYER, Circuit Judge:

Following his guilty plea to charges for drug distribution and related gun use, Harold Ray Wade, Jr. was sentenced to a mandatory minimum ten-year sentence for the drug charges and a consecutive mandatory five-year sentence for the gun charge. See 21 U.S.C. § 841(b); 18 U.S.C. § 924(c). In denying Wade's motion for a downward departure based on his substantial assistance to the government, the district court concluded that, in the absence of a motion made by the government under U.S.S.G. § 5K1.1, it had no authority to depart from the mandatory minimum sentences.

On appeal, Wade contends that (1) the district court erroneously concluded that it did not have the authority to depart downward for substantial assistance on his motion, which was supported by substantial evidence of the valuable cooperation that he provided, and (2) the court should have permitted an inquiry into the government's reasons for its refusal to make the motion under § 5K1.1 to determine whether it acted arbitrarily or in bad faith. Finding no error, we affirm.

There appears to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, Wade began a course of cooperation which provided valuable assistance to the government in other prosecutions, leading to the conviction of co-conspirators. Yet, with some disillusionment, he observes that the government made no comment about his cooperation at sentencing and refused to file a motion

for a downward departure under U.S.S.G. § 5K1.1. Wade brought these facts to the attention of the district court in connection with his motion for a downward departure and sought unsuccessfully to inquire of the government why it refused to make the motion. He argues that such an inquiry would have been relevant to resolve whether the government acted arbitrarily or in bad faith.

Limited authority to depart from mandatory minimum sentences is provided in 18 U.S.C. § 3553(e), which provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

See also 28 U.S.C. § 994(n) ("The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed."); U.S.S.G. § 5K1.1. Section 5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e). See Application Note 1 to § 5K1.1; United States v. Keene, ___ F.2d ___, No. 89-50617 (9th Cir. Apr. 29, 1991). The unambiguous language of 18 U.S.C. § 3553(e) leads to the single conclusion that courts may not depart downward from mandatory minimum sentences because of the substantial assistance of a defendant unless the government files a motion for departure. See, e.g., United States v. Francois, 889 F.2d 1341, 1345 (4th Cir. 1989), cert. denied, ___

U.S. ___, 110 S.Ct. 1822 (1990); United States v. Huerta, 878 F.2d 89, 91 (2d Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 845 (1990). The policy of § 3553(e) is "to provide an incentive to defendants to furnish assistance to law enforcement officials" by giving the officials the right to introduce flexibility into the otherwise rigorous inflexibility of mandatory sentences. United States v. Daiagi, 892 F.2d 31, 32 (4th Cir. 1989). Although the quid pro quo of the policy involves only law enforcement officials and defendants, once a motion by the government is filed, the court must exercise discretion in determining the appropriate level of departure, which may, when justified by the facts, be more or less than that recommended by the government. See United States v. Wilson, 896 F.2d 856, 859 (4th Cir. 1990) (Sentencing Commission has not limited the district court's authority in determining the amount of a departure under § 3553(e)); United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988) (although the government is given the authority to make the motion for a reduction of sentence for the defendant's substantial assistance, the actual authority to reduce the sentence remains vested in the district court), cert. denied, 489 U.S. 1022 (1989). The plain statutory language, however, permits the court's consideration of downward departures for substantial assistance only after the government has made the motion. Therefor , the argument by Wade that the sentencing court is authorized to depart downward on his motion, but in the absence of a government motion, must be readily rejected.

The more difficult question raised by Wade is whether he may query the good faith of the government in refusing to make the motion. He argues that the district court should have reviewed not only the strength of the evidence showing the value of his assistance but also the reasons and motives of the government in not making the motion. Relying on United States v. Justice, 877 F.2d 664 (8th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 375 (1989), he argues that the good faith of the government must be reviewable by the court so that the expressed Congressional policy of rewarding cooperation is not thwarted. See 28 U.S.C. § 994(n).

In Justice, where a similar argument was made, the court affirmed the district court's refusal to depart downward in the absence of a motion by the government made under U.S.S.G. § 5K1.1. In doing so, however, the court acknowledged the potential for an argument as made here by Wade:

> We believe that in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance to authorities as outlined above. Nevertheless, we are not prepared to decide this issue based on the record currently before us.
>
> Thus, while we are inclined to hold that a motion by the government may not be necessary in order for the sentencing court to consider a departure based on substantial assistance to authorities, we need not reach this issue.

Id. at 668-69. Justice's argument was based on the notion that 28 U.S.C. § 994(n) directs the Commission to "assure" that the Sentencing Guidelines recognize substantial assistance, and if U.S.S.G. § 5K1.1 were interpreted to deny the court's review of the

government's determinations on this issue, the Congressional mandate could be frustrated. The court left the issue open, citing United States v. White, 869 F.2d 822 (5th Cir.), cert. denied, 490 U.S. 1112 (1989), where the court observed that although it would be "the rarest of cases" in which the government would improperly fail to recognize substantial assistance, § 5K1.1 "obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." Id. at 829.

The Eighth Circuit revisited the question in United States v. Smitherman, 889 F.2d 189 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 1493 (1990), and again acknowledged the possibility that it would be willing to review a government's refusal to make a motion for a downward departure in the right circumstances.

> In this case, the government made no such motion. Although we have suggested that a section 5K1.1 motion might not be necessary in all cases [citing United States v. Justice], we do not view the present case as one that presents a question of prosecutorial bad faith or arbitrariness that might conceivably present a due process issue.

Id. at 191.

Our reading of 18 U.S.C. § 3553(e) and 28 U.S.C. § 994(n), however, leads us to the conclusion that the government alone has the right to decide, in its discretion, whether to file a motion for a downward departure based on the substantial assistance of a defendant. The statutory purpose of promoting defendants' cooperation with the government and the statutory restriction that

departures may be considered only on the motion of the government require an interpretation that the right to introduce flexibility into what is otherwise a mandatory sentence is given to the government for use as a prosecutorial tool which may be exercised in the sole discretion of the government. Moreover, neither 18 U.S.C. § 3553(e) nor 28 U.S.C. § 994(n) bestows on a defendant a beneficial interest that may be enforced as a right. By giving the right to request a downward departure from mandatory minimum sentences exclusively to the government, § 3553(e) of logical necessity excludes any claim of right by a defendant to demand that a motion for a departure be filed upon his unilaterally initiated cooperative efforts. See United States v. Daniels, 929 F.2d 128, 131 (4th Cir. 1991) ("In the absence of an agreement requiring the government to file [a § 5K1.1 motion for substantial assistance] the defendant has no right to demand that one be filed.").

Once we reach the conclusion that the government has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion. To conclude otherwise would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government.

The avenue open to a defendant for taking advantage of 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 is to negotiate a plea agreement with the government under which the defendant agrees to provide valuable cooperation for the government's commitment to

file a motion for a downward departure. When a defendant is able to negotiate a plea agreement that includes the government's agreement to file a motion for a downward departure under § 5K1.1, the defendant obtains rights to require the government to fulfill its promise. To those circumstances we apply the general law of contracts to determine whether the government has breached the agreement. See United States v. Connor, 930 F.2d 1073, ____ (4th Cir. 1991). If substantial assistance is provided and the bargain reached in the plea agreement is frustrated, the district court may then order specific performance or other equitable relief, or it may permit the plea to be withdrawn. Id. at ____. Cf. Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

While the government may have legitimate prosecutorial interests in choosing to negotiate a plea agreement and settle a prosecution with a defendant short of trial, it may also insist on a full prosecution and trial if it chooses not to negotiate or agree to terms of a plea agreement satisfactory to the defendant. The defendant's right is to be prosecuted and tried in accordance with the standards of due process and not to be given an agreement of compromise.

We therefore hold that, absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence for the substantial assistance of

the defendant, and the defendant is not entitled to an explanation for the government's refusal to make the motion or for its refusal to enter into an agreement to make the motion. The judgment of the district court is therefore affirmed.

AFFIRMED

ORIGINAL

No. 91-5771

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HAROLD RAY WADE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
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Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court has the authority to review the government's refusal to file a "substantial assistance" motion under Sentencing Guidelines § 5K1.1 and then impose a sentence below the statutory minimum and applicable Guidelines range.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-5771

HAROLD RAY WADE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 936 F.2d 169.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1991. The petition for a writ of certiorari was filed on September 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Middle District of North Carolina to conspiracy to possess with intent to distribute and to distribute cocaine, in

violation of 21 U.S.C. 846; possession with intent to distribute cocaine and distribution of cocaine, both in violation of 21 U.S.C. 841(a)(1); and use of a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). He was sentenced to a total of 15 years' imprisonment. The court of appeals affirmed. Pet. App. A1-A9.

1. On October 30, 1989, police officers executed a search warrant at petitioner's residence in Alamance County, North Carolina. After discovering 978 grams of cocaine, two handguns, and more than $22,000 in cash, the officers arrested petitioner. Following his arrest, petitioner admitted that he and an accomplice had traveled to Florida a few days earlier, where they had purchased a kilogram of cocaine for resale in North Carolina. Gov't C.A. Br. 3.

2. The presentence report noted that petitioner was subject to a mandatory minimum sentence of ten years' imprisonment on the drug charges and a consecutive mandatory sentence of five years' imprisonment on the firearms charge. Presentence Report 7; see 21 U.S.C. 841(b)(1)(B); 18 U.S.C. 924(c). In calculating the applicable Sentencing Guidelines range, the report recommended a two-level upward adjustment in petitioner's offense level pursuant to Guidelines § 3C1.1 for obstruction of justice. The report found that petitioner had obstructed justice by writing a letter urging another man to claim falsely that he was the owner of the handguns found in petitioner's residence. Presentence Report 2.

At sentencing, petitioner's counsel proffered evidence that petitioner had sought to cooperate with the government after his arrest by meeting with federal agents and providing them with information about other drug traffickers. C.A. App. 15. Counsel argued that the district court should sentence petitioner below the statutory minimum and the applicable Guidelines range because of petitioner's cooperation with the government, even though the government had not filed a motion requesting a downward departure under Guidelines § 5K1.1.[1] C.A. App. 11-13. The district court declined to depart downward based on petitioner's cooperation, concluding that it lacked the authority to do so in the absence of a motion by the government. C.A. App. 12-13. The court sentenced petitioner to the statutory minimum sentences on both the drug and firearms charges. C.A. App. 19-20.

3. The court of appeals affirmed. Pet. App. A1-A9. The court concluded that although there "appear[ed] to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, [petitioner] began a course of cooperation which provided valuable assistance to the government in other prosecutions," Pet. App. A2, the district court nevertheless was without authority to depart downward from the mandatory minimum sentence in the absence of a motion by the government. Pet. App. A3. The court held that because "the government

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[1] Section 5K1.1 permits the sentencing court to depart from the Guidelines "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense."

has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion."[2] Pet. App. A7.

ARGUMENT

Petitioner contends (Pet. 5-12) that the district court should have the authority to review a prosecutor's refusal to file a "substantial assistance" motion requesting a downward departure under Guidelines § 5K1.1 and then impose a sentence below the statutory minimum and the applicable Guidelines range. As the courts of appeals have consistently and correctly held, however, a sentencing court has no authority to impose -- on "substantial assistance" grounds -- a sentence below the statutory minimum or the Guidelines range in the absence of a motion by the government. See, e.g., United States v. Long, 936 F.2d 482, 483 (10th Cir. 1991); United States v. LaGuardia, 902 F.2d 1010, 1013-1017 (1st Cir. 1990); United States v. Alamin, 895 F.2d 1335, 1337 (11th Cir.), cert. denied, 111 S. Ct. 196 (1990); United States v. Coleman, 895 F.2d 501, 504-505 (8th Cir. 1990); United States v. Francois, 889 F.2d 1341, 1345 (4th Cir. 1989),

[2] The court noted, however, that a defendant could take advantage of the "substantial assistance" provisions by "negotiat[ing] a plea agreement with the government under which the defendant agrees to provide valuable cooperation [in exchange] for the government's commitment to file a motion for a downward departure." Pet. App. A7-A8.

cert. denied, 110 S. Ct. 1822 (1990).[3] This Court has recently declined on several occasions to review that issue, e.g., Chotas v. United States, cert. denied, 111 S. Ct. 1421 (1991); Sutton v. United States, cert. denied, 111 S. Ct. 759 (1991); Rexach v. United States, cert. denied, 111 S. Ct. 433 (1990). Petitioner offers no persuasive reason for the Court to treat this case differently.

In any event, petitioner's claim is meritless. Section 3553(e) of Title 18 provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below the level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." Sentencing Guidelines § 5K1.1, which the Sentencing Commission patterned after Section 3553(e), similarly provides that a court may depart from the Guidelines "[u]pon motion of the Government stating that the defendant has provided substantial assistance" to the government. The prerogative accorded to the government by Congress and the Commission in promulgating the "substantial assistance" provisions is akin to the "exclusive authority and absolute discretion" enjoyed by the government in determining whether to prosecute, see United States v. Nixon, 418

[3] Petitioner mistakenly relies on the dissenting opinion in United States v. Gutierrez, 908 F.2d 349 (8th Cir. 1990). The panel's decision in that case was vacated when rehearing en banc was granted, id. at 349, and the en banc court divided evenly, thereby affirming the district court without opinion. United States v. Gutierrez, 917 F.2d 379 (8th Cir. 1990) (en banc); see United States v. Hubers, 938 F.2d 827, 829 (8th Cir. 1991).

U.S. 683, 693 (1974), or what charges to bring, see United States v. Batchelder, 442 U.S. 114, 124-125 (1979); see also United States v. Huerta, 878 F.2d 89, 92 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990). Like the decisions whether and how to prosecute, the government's decision not to file a "substantial assistance" motion is not subject to judicial review.[4] Huerta, 878 F.2d at 94; see also United States v. Kuntz, 908 F.2d 655, 657 (10th Cir. 1990).

To be sure, as petitioner points out (Pet. 6-10), several courts of appeals have left open the question whether a bad faith refusal by the government to file a "substantial assistance" motion is subject to judicial scrutiny.[5] See United States v.

[4] As petitioner acknowledges (Pet. 9), the courts of appeals have uniformly upheld the government motion requirement of 18 U.S.C. 3553(e) and Guidelines § 5K1.1 against due process challenges. See, e.g., United States v. Doe, 934 F.2d 353, 356-358 (D.C. Cir. 1991), cert. denied, No. 91-6633 (Oct. 7, 1991); United States v. Harrison, 918 F.2d 30, 33 (5th Cir. 1990); United States v. Kuntz, 908 F.2d 655, 657-658 (10th Cir. 1990); United States v. Levy, 904 F.2d 1026, 1035-1036 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991); United States v. LaGuardia, 902 F.2d 1010, 1013-1017 (1st Cir. 1990); United States v. Lewis, 896 F.2d 246, 249 (7th Cir. 1990); United States v. Francois, 889 F.2d 1341, 1343-1345 (4th Cir. 1989), cert. denied, 110 S. Ct. 1822 (1990); United States v. Grant, 886 F.2d 1513, 1513-1514 (8th Cir. 1989); United States v. Huerta, 878 F.2d 89, 93-94 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990); United States v. Ayarza, 874 F.2d 647, 653 (9th Cir. 1989), cert. denied, 493 U.S. 1047 (1990); United States v. Musser, 856 F.2d 1484, 1487 (11th Cir. 1988), cert. denied, 489 U.S. 1022 (1989).

[5] Petitioner also notes (Pet. 7-8) that several courts have suggested, as the court of appeals did here, that when the government has expressly agreed to make a motion for downward departure in exchange for the defendant's cooperation, the sentencing court may review the government's refusal to file a "substantial assistance" motion to determine whether the agreement has been breached. See, e.g., United States v. Conner, 930 F.2d 1073, 1075 (4th Cir. 1991); United States v. Rexach, 896

Mena, 925 F.2d 354, 356 (9th Cir. 1991); United States v. Justice, 877 F.2d 664, 668-669 (8th Cir.), cert. denied, 110 S. Ct. 375 (1989); United States v. White, 869 F.2d 822, 829 (5th Cir.), cert. denied, 490 U.S. 1112 (1989). That issue, however, is not presented here. While petitioner may have provided assistance to the government in other prosecutions, Pet. App. A2, he has made no showing that the assistance he provided was sufficiently substantial to entitle him to a "substantial assistance" motion under the standards applied by the United States Attorney's Office. Moreover, the presentence report concluded that petitioner obstructed justice in his own case by encouraging another man to make a false claim of ownership of the guns involved in petitioner's offense. Under these circumstances, petitioner cannot reasonably complain that the government acted in bad faith in refusing to file a "substantial assistance" motion.[6]

F.2d 710, 713-714 (2d Cir. 1990). Those decisions have no bearing here, however, because there was no such agreement in this case. Pet. App. A2.

[6] We are unaware of any court of appeals decision finding bad faith in a prosecutor's refusal to file a "substantial assistance" motion. See generally United States v. Brown, 912 F.2d 453 (10th Cir. 1990); United States v. Spees, 911 F.2d 126 (8th Cir. 1990); United States v. Smitherson, 889 F.2d 189 (8th Cir. 1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

NINA GOODMAN
Attorney

OCTOBER 1991

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

HAROLE RAY WADE, JR., PETITIONER	)	
V	)	NO. 91-5771
UNITED STATES OF AMERICA	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on October 31, 1991.

J. MATTHEW MARTIN, ESQ.
MARTIN & MARTIN, P.A.
102 NORTH CHURTON STREET
HILLSBOROUGH, NC 27278

KENNETH W. STARR
Solicitor General

October 31, 1991

CERTIFICATE OF SERVICE

I, J. Matthew Martin, do hereby certify that I did on this date serve copy of the foregoing Motion for Leave to Proceed **In Forma Pauperis** with regard to the above-captioned case by enclosing said copy of Motion in a self-addressed, stamped envelope and depositing said envelope in an official United States Depository addressed as follows:

Richard S. Glaser, Esquire
Assistant U.S. Attorney
Post Office Box 1858
Greensboro, N.C. 27402

The Honorable Kenneth W. Star
Solicitor General of U.S.
U.S. Department of Justice
10th & Constitution Drive
Washington, D.C. 20530

This the 10th day of September, 1991.

J. Matthew Martin
Attorney for Petitioner
Harold Ray Wade, Jr.

OF COUNSEL:
Martin & Martin, P.A.
102 North Churton Street
Hillsborough, N.C. 27278
(919) 732-6112

No. 91-5771

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

HAROLD RAY WADE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MOTION OF AMICUS CURIAE FOR
LEAVE TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Rule 28.7, amicus curiae National Association of Criminal Defense Lawyers moves the Court for leave to participate in oral argument on behalf of petitioner. The grounds for the motion are as follows:

1. This case concerns 18 U.S.C. § 3553(e), which governs the ability of a district court to give a sentence below a statutorily-mandated minimum sentence based on a defendant's "substantial assistance" to the authorities in the investigation or prosecution of another. Section 3553(e) conditions such a lower sentence on a motion being made by the prosecutor.

2. The petition for a writ of certiorari presented a single issue: whether a prosecutor's refusal to make this motion is

- 5 pp

subject to review by the district court.[1] Petitioner's brief addresses this issue alone. The court below, however, was also presented with the issue of whether the government motion requirement improperly limits the authority of the district court. The court ruled, as it had previously, that the requirement does not violate the Fifth Amendment Due Process Clause or separation of powers principles. See United States v. Wade, 936 F.2d 169, 171 (4th Cir.), cert. granted, 60 U.S.L.W. 3418 (December 9, 1991); United States v. Francois, 889 F.2d 1341, 1344-45 (4th Cir. 1989), cert. denied, 110 S. Ct. 1822 (1990).

3. The reviewability of the prosecutor's refusal is a secondary issue, as recognized by the court below, 936 F.2d at 171, and the other courts of appeals as well.[2] As a threshold matter, the constitutionality of the government motion requirement must be examined. The brief filed by amicus states the questions presented as follows:

> 1. Does § 3553(e) violate the Fifth Amendment Due Process Clause because it deprives a defendant of a liberty interest by (a) granting adjudicatory power to the prosecutor; and (b) failing to provide a defendant with an opportunity to be heard by the court?

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[1] The petition framed the issue in terms of § 5K1.1 of the United States Sentencing Guidelines, which has an identical government motion requirement. Amicus believes that § 5K1.1 is not at issue in this case. See Brief of Amicus Curiae at 4-5 n.3. Petitioner agrees that § 3553(e) is the operative provision. See Brief for Petitioner at 10 n.2 (manuscript provided to Clerk for printing).

[2] E.g., United States v. Levy, 904 F.2d 1026, 1035-36 & n.3 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991) (construing § 5K1.1); United States v. La Guardia, 902 F.2d 1010, 1017 & n.6 (1st Cir. 1990) (§ 3553(e) and § 5K1.1).

> 2. Does § 3553(e)'s grant of adjudicatory power to the prosecutor violate separation of powers principles?
>
> 3. Is a prosecutor's refusal to file a § 3553(e) motion subject to examination by the district court? If so, what is the appropriate standard of review?

The brief filed by amicus fully addresses each issue.

4. Amicus respectfully submits to the Court that both logic and the interests of judicial economy require that the constitutionality of § 3553(e)'s government motion requirement be examined prior to consideration of whether the prosecutor's refusal to make the motion is subject to judicial review. If the requirement is found to violate the Fifth Amendment Due Process Clause or separation of powers principles, the reviewability issue will never be reached. Moreover, whether the government motion requirement satisfies the guarantee of due process is far from settled and is plainly worthy of this Court's consideration:

> [T]he difficulty of the issue, the magnitude of the stakes, and the superficiality of the analysis underlying several of the circuits' decisions give reason to hope that the Supreme Court will at some point evaluate [the government motion requirement] in the light shed by its prior teachings on the requirements of due process in the sentencing context.

United States v. Doe, 934 F.2d 353, 363 (D.C. Cir.) (D.H. Ginsburg, J., concurring), cert. denied, 112 S. Ct. 268 (1991) (considering U.S.S.G. § 5K1.1).

5. In light of the importance of the threshold issue of constitutionality, amicus asks that the court (a) allow amicus to

present oral argument on that issue; and (b) grant amicus time for argument in addition to the time already allotted to petitioner.

6. Counsel for petitioner has authorized the undersigned to represent that petitioner consents to this motion.

WHEREFORE, amicus prays that this Court grant the motion for leave to participate in oral argument.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

HAROLD RAY WADE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that on this 31st day of January, 1992, three copies of Motion of Amicus Curiae for Leave to Participate in Oral Argument were mailed first class, postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and J. Matthew Martin, Martin & Martin, P.A., 102 North Churton Street, Hillsborough, North Carolina 27278. All parties required to be served have been served.

Respectfully submitted,

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No. 91-5771

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

HAROLD RAY WADE,
Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 10, 1991
WRIT OF CERTIORARI GRANTED DECEMBER 9, 1991

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
11/28/91	Indictment
12/4/89	Arraignment
12/14/89	Motion to suppress filed. Motion for severance filed. Motion for increase of peremptory challenges filed.
12/18/89	Government's responses to motions filed.
3/5/90	Plea change.
3/7/90	Plea change.
4/9/90	Defendant position with regard to sentencing factors filed.
5/11/90	Sentencing hearing.
5/14/90	Judgment Order filed.
5/18/90	Notice of appeal filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

CR-89-278-01-G
CR-89-278-02-G
CR-89-278-03-G

UNITED STATES OF AMERICA

v.

HAROLD RAY WADE, JR., DWIGHT MARKS,
also known as "Rabbit," TERRI MICHELLE EDWARDS

The Grand Jury charges:

COUNT ONE

From on or about October 25, 1989, up to and including October 30, 1989, in the Middle District of North Carolina, and elsewhere, HAROLD RAY WADE, JR., DWIGHT MARKS, also known as "Rabbit," TERRY MICHELLE EDWARDS, and divers other persons, known and unknown to the Grand Jurors, knowingly and intentionally did unlawfully conspire, combine, confederate and agree together and with each other to commit offenses against the laws of the United States, that is:

1. To willfully, intentionally, and unlawfully possess with intent to distribute quantities of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Section 841(a)(1).

2. To willfully, intentionally, and unlawfully distribute quantities of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(B).

OVERT ACTS

In furtherance of the aforesaid conspiracy and to effect the objects and purposes thereof, HAROLD RAY WADE, JR., DWIGHT MARKS, also known as "Rabbit," TERRY MICHELLE EDWARDS, and others committed numerous overt acts in the Middle District of North Carolina and elsewhere, including but not limited to the following:

1. On or about October 25, 1989, HAROLD RAY WADE, JR., and DWIGHT MARKS, also known as "Rabbit," traveled from the Middle District of North Carolina to the Southern District of Florida for the purpose of purchasing cocaine for subsequent resale in the Middle District of North Carolina.

2. On or about October 25, 1989, HAROLD RAY WADE, JR., and DWIGHT MARKS, also known as "Rabbit," met with TERRI MICHELLE EDWARDS, an acquaintance of DWIGHT MARKS, for the purpose of arranging the purchase of cocaine hydrochloride for subsequent resale in the Middle District of North Carolina.

3. On or about October 25, 1989, HAROLD RAY WADE, JR., purchased approximately one kilogram and ten ounces of cocaine from TERRI MICHELLE EDWARDS for subsequent resale in the Middle District of North Carolina.

4. On or about October 27, 1989, HAROLD RAY WADE, JR., and DWIGHT MARKS, also known as "Rabbit," returned to the Middle District of North Caro-

lina from the Southern District of Florida in possession of the aforesaid cocaine purchased from TERRI MICHELLE EDWARDS.

5. On or about October 27, 1989, in the Middle District of North Carolina, HAROLD RAY WADE, JR., gave approximately two ounces of the aforesaid cocaine to DWIGHT MARKS, also known as "Rabbit," as compensation for facilitating the purchase of said cocaine from TERRI MICHELLE EDWARDS.

6. On or about October 30, 1989, in the Middle District of North Carolina, HAROLD RAY WADE, JR., distributed approximately one ounce of cocaine hydrochloride to another individual.

COUNT TWO

On or about October 30, 1989, in the County of Caswell, in the Middle District of North Carolina, HAROLD RAY WADE, JR., willfully, knowingly and intentionally did unlawfully possess with intent to distribute 951.8 grams (net weight) of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B).

COUNT THREE

On or about October 30, 1989, in the County of Caswell, in the Middle District of North Carolina, HAROLD RAY WADE, JR., willfully, knowingly and intentionally did unlawfully distribute 27.1 grams (net weight) of cocaine hydrochloride, a Schedule II, narcotic controlled substance within the meaning of Title 21, United States Code, Section 812; in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C).

COUNT FOUR

On or about October 30, 1989, in the County of Caswell, in the Middle District of North Carolina, HAROLD RAY WADE, JR., during and in relation to a drug trafficking crime for which he could be prosecuted in a court of the United States, that is, conspiracy to possess with intent to distribute and to distribute cocaine hydrochloride, in violation of Title 21, United States Code, Section 846, and possession with intent to distribute cocaine hydrochloride and the distribution of cocaine hydrochloride, in violation of Title 21, United States Code, Section 841(a)(1), did carry and use two firearms, that is, a Ruger .357 magnum revolver, Serial Number 161-55480, and a Springfield Armory .45 caliber handgun, Serial Number 36179; in violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL:

/s/ Susan Childress
Foreman

/s/ Robert H. Edmund, Jr.
United States Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

[Title Omitted in Printing]

TRANSCRIPT OF SENTENCING

THE HONORABLE N. CARLTON TILLEY, JR., PRESIDING

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[2]

PROCEEDINGS

MR. GLASER: Your Honor, calling United States v. Harold Ray Wade, Junior, CR-89-27-01-G. Mr. Wade is represented by Mr. Matthew Martin, and Mr. Wade is on for sentencing today.

THE COURT: Good morning. Mr. Martin.

MR. MARTIN: Good morning, Judge.

MR. GLASER: Your Honor, I've been notified I caught the marshal unaware, and they are bringing him up posthaste.

(Defendant entered the courtroom)

THE COURT: Mr. Martin, you have had ample opportunity to review the presentence report?

MR. MARTIN: Yes, I have, Your Honor.

THE COURT: And you discussed it with Mr. Wade?

MR. MARTIN: Yes, I have, Your Honor.

THE COURT: And do you take issue with any of the findings or recommendations set out in the presentence report?

MR. MARTIN: Well, we did originally, Judge. I filed the documents. I have been apprised of the court's tenta-

tive findings, and I believe if I can confer briefly with Mr. Wade on those—I have not been able to confer with him about those—I believe they may resolve all the questions I have about the presentence report. May I have [3] just one moment?

THE COURT: Surely.

MR. MARTIN: Your Honor, I have relied on a case with regard to obstruction of justice which I believe I misplaced, and I would withdraw my reliance on that. And I believe the court's tentative finding on both obstruction of justice and acceptance of responsibility are correct.

So as far as that aspect of the presentence report goes, I believe I have no objections at this point. There is one issue I would like to bring up to the court. It's not—and I hope you don't feel like I'm just rerunning through the—

THE COURT: Well, let me ask you a question though.

MR. MARTIN: Yes, sir.

THE COURT: What difference does it really make? Aren't we talking about a mandatory ten-year sentence?

MR. MARTIN: We are.

THE COURT: And then a mandatory 60 months to follow that? So doesn't the guideline range sort of—

MR. MARTIN: You're exactly right. But I believe it's—and in May of 1990 I believe that it really doesn't make—I'm sort of splitting hairs to argue about the guideline range when you have a mandatory minimum sentence. However, we're talking about a period of substantial incarceration for Mr. Wade. And the law may change, and it may be that something that I do or don't do now may come to [4] affect him in some number of years. And so I think it's important at this stage for me at least to treat every issue that I think is treatable before the court.

But without belaboring that, I would say that I believe that your tentative findings are appropriate and Mr. Wade, after consultation, and I agree with that.

One issue really that I would like to bring before the court today is not so much a presentence report, because I think it's a very good presentence report. It is, again, a question of the, I suppose, the prosecutorial function—and I don't mean to be critical, and I also don't want you to feel like you are watching a rerun of the past sentencing.

I heard the court say that the court feels that the Sentencing Commission in its wisdom has delegated the responsibility of determining the qualitative/quantitative effect of any cooperation by a defendant to the prosecution, and you personally or as the court—not you personally—but the court feels that you have no real leeway in that regard. And—I was listening very carefully.

I would point the court to paragraphs 9 and 10 of the presentence report. And with regard to Mr. Wade's cooperation in this very case, and I would argue maybe—my argument is that in Section 5K2.0 of the Guidelines, which is the general provisions of departure and policy, as well as in Title 18, United States Code, Section 3553(a)1 and 3553(b), [5] the court is allowed to take into consideration items and information in evidence which, if it considers them not to have been treated or if it considers them to have been not adequately taken into consideration by the Sentencing Commission—and my argument to you is that there is evidence in the presentence report, evidence which I believe I can present via special agent's testimony that would indicate that there is a level of cooperation in this case that, although the Government in its wisdom chose not to grant substantial assistance to, may have not been adequately taken into consideration by the Sentencing Commission, that this type of evidence might allow for a downward departure.

THE COURT: Well, you contend it would allow for a departure below the statutory minimum?

MR. MARTIN: I believe that if the government were to make that motion—

THE COURT: Yes, sir, absolutely, the government, but that's by statute. But you contend that I just without that motion could decide that Mr. Wade had provided substantial assistance to somebody, that I could come below the statutory minimum?

MR. MARTIN: I believe that you could. I do not have a—I do not have a case to cite to you on that.

THE COURT: Well, I believe I'm going to let you make some law with that case because I do not believe so, and [6] I hold I do not have that authority. You may appeal that belief that I feel I would—that I am imposing this sentence contrary to law because I don't believe that I can depart upon your motion for substantial assistance below the mandatory minimum.

MR. MARTIN: Well, now, I do not—

THE COURT: I will tell you that I would anticipate sentencing at the minimum with regard to the conviction. And I don't know what further argument really regardless of what happens in the future—you know, I'm not going to impose a sentence, if this were strictly Guidelines, I would impose X, but because it's not Guidelines, I'm going to impose the statutory minimum of Y. I've never heard of a sentence like that before.

MR. MARTIN: I don't want—I believe I do not have the standing to make a motion for substantial assistance. I think the only thing that I can say is that the lack of the government—in the absence of the government's motion in this case for substantial assistance, the absence of that motion, is a factor which the Sentencing Commission would not—could not have taken into effect given the level of cooperation in this case. That's my argument.

THE COURT: But, I mean, we're not talking about the Sentencing Commission either. We're talking about [7] mandatory minimums, aren't we?

MR. MARTIN: Exactly. But—

THE COURT: Did the Sentencing Commission say you can come downward from a mandatory minimum or does that have to be a congressional—there is a statute which indicates you can, so I guess we're really jousting with a windmill over that. But I don't think a downward departure, the term "downward departure" in the Guidelines comprehends coming below the mandatory minimum of the statute.

MR. MARTIN: Well, in that regard, then, would it be appropriate for me to put on evidence at this point or are you ruling basically on my grounds for making this—

THE COURT: I'm ruling on your grounds.

MR. MARTIN: Well, then, I don't—I believe that I'm being cut off before I get to that point, and so if I—

THE COURT: That's what I'm saying. You may appeal on my ruling.

MR. MARTIN: Then I think that would be appropriate rather than for me to have extensive sort of replay of where we've been earlier in the day.

THE COURT: You may state for the record, in the event you desire to appeal that, what the evidence would be.

MR. MARTIN: The evidence—I will do that. Other than the evidence, which is quite correct that's in the presentence report in paragraphs 9 and 10, the evidence would [8] be that Mr. Wade met on, I believe, several occasions with Agent Deignan of the Drug Enforcement Administration, that he was of assistance in beginning an investigation which led to the arrest of an unrelated person, a person not in this conspiracy. That arrest and case is going on in state court now, and to my knowledge has not been resolved as of yet. Mr. Wade played an instrumental role in that case.

And that, additionally, Mr. Wade has offered to cooperate further in that case. And that, additionally, he has provided other assistance in the nature of identification of other people suspected of drug crimes in the Middle District.

THE COURT: All right, sir.

MR. MARTIN: That would be our proffer.

THE COURT: And it is my understanding that should his cooperation and assistance with the government reach the level required by the United States Attorney's Office, that they may still come in within the next year and file a motion for substantial assistance and a consideration of having his sentence reduced below the mandatory minimum.

MR. MARTIN: I believe that's a Rule 35 motion, that's correct. And it may—that may well obviate the necessity for us to litigate this issue further. But I wanted to bring it before the court.

THE COURT: Thank you, sir.

[9] MR. MARTIN: Other than that—excuse me one moment.

Other than that, Your Honor, I believe this is a very good presentence report.

THE COURT: Okay. As I say, I anticipate, Mr. Martin—I don't mean to cut your argument short—but I would anticipate imposing a sentence of 120 months, and then the 60 months mandatory, eight year supervised release.

MR. MARTIN: With that in mind, Judge, I would like to just tell you briefly a little bit about my client. Mr. Wade is not a malevolent or bad or mean person. I believe that his own substance abuse problems pulled him into this. I think he will tell you that his own greed, though, is what—greed and stupidity is what carried him on.

To be frank, up until the point of this case, Judge, Mr. Wade was not in the big leagues. I think he would tell you truthfully this is the first kilogram-level transaction he was ever involved in. He was arrested on it almost immediately. So he is not a very sophisticated person compared with some of the traffickers that come before the court.

He is actually a very pleasant, nice person. He has a very nice family, and I would let the court know they are here today. They have been very supportive of him. They are—he doesn't come from a broken home; he comes from two [10] very hard-working parents. I think he feels very badly about, not just about this offense, but about the whole portion of his life that led up to him being here today.

He is an intelligent person, he is—and when I say his greed led him to this, I don't mean that he was consumed by it. But foolhardiness and greed together sometimes can lead to make very, very terrible mistakes.

I believe Mr. Wade knows that if he ever—when this sentence is over—if he ever returns to federal court, that he will be a career defendant and will go away for decades. And I don't believe that he will ever be in this position again. I don't. I think he has some things he would like to tell you.

THE COURT: Sure.

MR. MARTIN: And I appreciate the frankness of our discussion today.

THE COURT: Thank you, Mr. Martin.

Mr. Wade, be glad to hear whatever you would like to say.

THE DEFENDANT: Yes, sir. I know I've noticed since I've been in jail, I see now—I wish I knew now what I knew before. I mean, I wish I knew before what I know now about cocaine, like deceitfulness and lies and untruthfulness that comes along with it.

In jail I've got to see some of that, some of the [11] corruptness that I was causing that I sort of put behind in my mind that I really didn't want to, you know, really realize it. But now I see what I was doing to the community. It's sort of like a false, if you may, it's sort of like a false god a lot of people were deceived into following. I was one of those people.

You know, it's a lot of lies and all that goes along with cocaine. And I just, I wish I never had gotten involved

with it, especially, I feel like I've really been, I've deceived my parents, my little girl, myself, you know, in following this god. I wish I never had really gotten involved in it. I just wish I had stayed clear of it.

In 1985 I think my record will show that I got busted for felony possession of marijuana. I wish then that I would have got some time so I could have realized the nature of my crime then so I wouldn't have gotten back into it. But I did. So then that led me to go right back into it, which I wish I never would have done it.

And the only thing I can really say now is that I'm really sorry for ever really getting into it. It's not only because of my habit, but it was for greed and material possessions that led me into this thing. And that's all I have to say to the court.

THE COURT: Thank you, Mr. Wade.

Mr. Glaser, do you care to be heard?

[12] MR. GLASER: No, Your Honor.

THE COURT: Mr. Wade, I agree that it really is a, sitting in court from one day to the next, and it seems like about all we see is cocaine cases or crack cases or case where people have stolen or robbed to get money to procure cocaine or crack. There is so much heartbreak. Not just your family, but so many others.

You're an intelligent person. You're a very articulate person. And it really is heartbreaking to see somebody who could make such a contribution to society as you have to be where, for a long time, you can't. And it's obvious you do care about your family. It's obvious from that letter that surfaced the day that we were going to trial on the gun charge that you even in that letter had great concern for your family. And I'm sure they share that concern for you or they wouldn't be here today.

As I've told Mr. Martin, I feel that—I have no choice in this case. The statutes set the minimum which you can receive. And that's what I intend to impose. But I hope you are able to fashion the time that you do spend incarcerated maintaining the attitude when you do come out,

you will be the positive force on society that you really should be right now or that your family would like you to be right now.

It is the judgment of the court that Mr. Wade be committed to the custody of the Bureau of Prisons on Counts [13] One, Two, and Three for a period of 120 months, to be followed by a period of eight years supervised release.

It is further ordered that pursuant to Count Four, he be sentenced to the custody of the Bureau of Prisons for a period of 60 months to commence at the expiration of the sentence entered under Counts One, Two, and Three.

The statutory or the supervised release term under Count Four will merge with that eight years previously entered.

It is determined that a special assessment of $200, which is $50 per count, must be paid. But that because of Mr. Wade's financial situation, that no fine will be entered because he is incapable of paying a fine and will not be for a while.

I wish you the best in keeping up that attitude.

THE DEFENDANT: Yes, sir.

THE COURT: Thank you.

MR. MARTIN: Judge, if I may, there is one item Mr. Wade has asked me to ask you about. I believe it's automatic, but to make him feel better, I will ask that the time he spent incarcerated since October, I believe, be credited towards his sentence.

THE COURT: It is my understanding that is automatic. That's nothing I have authority to control. But it is my understanding that is automatic. You will receive full credit for your time spent.

[14] MR. MARTIN: Judge, one final item. There was some property seized from Mr. Wade that he was administratively notified that it had been subject to forfeiture, and his family is handling that. There were some items seized which have neither been returned nor have been notified that they are the subject of forfeiture provisions.

And I wonder if the court has anything that it can do to either request that they be returned to the family or that the government be required to move forward on the forfeiture?

THE COURT: Mr. Martin, I don't even know what you're talking about, and I know of nothing—I suppose you could file a legal action to compel a return if the government is not going to seek forfeiture. But that would be a separate proceeding I would think.

MR. MARTIN: Well, I understand that. We did have that concern. It is not a great—it is some recreational vehicles. It is not a great amount of property.

THE COURT: Mr. Glaser may have knowledge of that and be able to share that knowledge with you at this time.

MR. MARTIN: Well, Mr. Francis is the prosecutor in this case.

MR. GLASER: Your Honor, I invite Mr. Martin up to our office immediately following this hearing so we can talk about it. Possibly Mr. Robertson could probably have a better handle on the forfeiture aspect.

[15] THE COURT: Fine. I appreciate that.

MR. MARTIN: Thank you very much.

I'm returning the presentence report that I have.

Mr. Wade, do you have part of yours?

THE COURT: Excuse me, Mr. Martin. I did not—as special conditions of supervised release, Mr. Johnson reminds me I did not make my usual findings.

Mr. Wade, during your supervised release period, it is ordered that you submit to any substance abuse testing directed by the probation officer, which may include such things as urinalysis. Also, if the probation officer feels that you should participate in some substance abuse treatment program, that you must participate in whatever treatment program is recommended by the probation officer. That will be the only conditions.

MR. MARTIN: Thank you very much, Judge. I'm returning my presentence report to Mr. Johnson.

THE COURT: Thank you.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

[Title Omitted in Printing]

JUDGMENT INCLUDING SENTENCING UNDER THE SENTENCING REFORM ACT

[Filed May 14, 1990]

J. Matthew Martin, Defendant's Attorney.

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 through 4.

☐ was found guilty on count(s) —— after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
21:846, 841(a)(1) & (b)(1)(B)	Conspiracy: To possess with intent to distribute and to distribute cocaine hydrochloride, a Schedule II, narcotic controlled substance.	1
21:841(a)(1) & (b)(1)(B)	Possess with intent to distribute cocaine hydrochloride.	2
21:841(a)(1) & (b)(1)(C)	Distribute cocaine hydrochloride.	3
18:924(c)(1)	Carry and use firearms in drug trafficking crimes.	4

The defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on counts(s) ——, and is discharged as to such count(s).

☐ Count(s) —— (is) (are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number.
242-17-2856

Defendant's mailing address:
Route 1, Box 357-A
Gibsonville, NC

May 10, 1990
Date of Imposition of Sentence

/s/ N. Carlton Tilley, Jr.
Signature of Judicial Officer

N. CARLTON TILLEY, JR.
U.S. District Judge
Name & Title of Judicial Officer

May 11, 1990
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United Bureau of Prisons to be imprisoned for a term of one hundred twenty (120) months on Counts 1 through 3 consolidated; sixty (60) months on Count 4 to begin at the expiration of the sentence imposed on Counts 1 through 3 consolidated.

☐ The Court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district,

☐ at ——— a.m. / p.m. on ———.

☐ as notified by the Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

☐ before 2 p.m. on ———.

☐ as notified by the United States Marshal.

☐ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows: ———

Defendant delivered on ——— to ——— at ———, with a certified copy of this Judgment.

———
United States Marshal

By ———
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of eight (8) years on Counts 1 through 3.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

1. Submit to substance abuse testing which may include urinalysis, as directed by the U.S. Probation Officer; and
2. If the U. S. Probation Officer feels the defendant should participate in any substance abuse treatment program, he shall do so as directed.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

[Title Omitted in Printing]

NOTICE OF APPEAL

[Filed May 18, 1990]

Notice is hereby given that Harold Ray Wade, defendant above-named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Judgment and Commitments entered into in this matter on the 10th day of May, 1990.

Respectfully submitted, this the 16th day of May, 1990.

/s/ J. Matthew Martin
J. MATTHEW MARTIN
N.C. State Bar No. 13597

Of Counsel:

Stanback, Stanback & Martin
102 North Churton Street
Hillsborough, North Carolina 27278
(919) 732-6112

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5805

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

HAROLD RAY WADE, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Norwood Carlton Tilley, Jr., District Judge. (CR-89-278-G)

Argued: February 8, 1991 Decided: June 12,1991

Before ERVIN, Chief Judge, NIEMEYER, Circuit Judge, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

NIEMEYER, Circuit Judge:

Following his guilty plea to charges for drug distribution and related gun use, Harold Ray Wade, Jr. was sentenced to a mandatory minimum ten-year sentence for the drug charges and a consecutive mandatory five-year sentence for the gun charge. *See* 21 U.S.C. § 841(b); 18

U.S.C. § 924(c). In denying Wade's motion for a downward departure based on his substantial assistance to the government, the district court concluded that, in the absence of a motion made by the government under U.S.S.G. § 5K1.1, it had no authority to depart from the mandatory minimum sentences.

On appeal, Wade contends that (1) the district court erroneously concluded that it did not have the authority to depart downward for substantial assistance on his motion, which was supported by substantial evidence of the valuable cooperation that he provided, and (2) the court should have permitted an inquiry into the government's reasons for its refusal to make the motion under § 5K1.1 to determine whether it acted arbitrarily or in bad faith. Finding no error, we affirm.

There appears to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, Wade began a course of cooperation which provided valuable assistance to the government in other prosecutions, leading to the conviction of co-conspirators. Yet, with some disillusionment, he observes that the government made no comment about his cooperation at sentencing and refused to file a motion for a downward departure under U.S.S.G. § 5K1.1. Wade brought these facts to the attention of the district court in connection with his motion for a downward departure and sought unsuccessfully to inquire of the government why it refused to make the motion. He argues that such an inquiry would have been relevant to resolve whether the government acted arbitrarily or in bad faith.

Limited authority to depart from mandatory minimum sentences is provided in 18 U.S.C. § 3553(e), which provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

See also 28 U.S.C. § 994(n) ("The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed."); U.S.S.G. § 5K1.1. Section 5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553(e). *See* Application Note 1 to § 5K1.1; *United States v. Keene*, —— F.2d ——, No. 89-50617 (9th Cir. Apr. 29, 1991). The unambiguous language of 18 U.S.C. § 3553(e) leads to the single conclusion that courts may not depart downward from mandatory minimum sentences because of the substantial assistance of a defendant unless the government files a motion for departure. *See, e.g., United States v. Francois*, 889 F.2d 1341, 1345 (4th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1822 (1990); *United States v. Huerta*, 878 F.2d 89, 91 (2d Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 845 (1990). The policy of § 3553(e) is "to provide an incentive to defendants to furnish assistance to law enforcement officials" by giving the officials the right to introduce flexibility into the otherwise rigorous inflexibility of mandatory sentences. *United States v. Daiagi*, 892 F.2d 31, 32 (4th Cir. 1989). Although the *quid pro quo* of the policy involves only law enforcement officials and defendants, once a motion by the government is filed, the court must exercise discretion in determining the appropriate level of departure, which may, when justified by the facts, be more or less than that recommended by the government. *See United States v. Wilson*, 896 F.2d 856, 859 (4th Cir. 1990) (Sentencing Commission has not

limited the district court's authority in determining the amount of a departure under § 3553(e)); *United States v. Musser*, 856 F.2d 1484, 1487 (11th Cir. 1988) (although the government is given the authority to *make the motion* for a reduction of sentence for the defendant's substantial assistance, the actual authority to reduce the sentence remains vested in the district court), *cert. denied*, 489 U.S. 1022 (1989). The plain statutory language, however, permits the court's consideration of downward departures for substantial assistance only after the government has made the motion. Therefore, the argument by Wade that the sentencing court is authorized to depart downward on his motion, but in the absence of a government motion, must be readily rejected.

The more difficult question raised by Wade is whether he may query the good faith of the government in refusing to make the motion. He argues that the district court should have reviewed not only the strength of the evidence showing the value of his assistance but also the reasons and motives of the government in not making the motion. Relying on *United States v. Justice*, 877 F.2d 664 (8th Cir.), *cert. denied*, —— U.S. ——, 110 S.Ct. 375 (1989), he argues that the good faith of the government must be reviewable by the court so that the expressed Congressional policy of rewarding cooperation is not thwarted. *See* 28 U.S.C. § 994(n).

In *Justice*, where a similar argument was made, the court affirmed the district court's refusal to depart downward in the absence of a motion by the government made under U.S.S.G. § 5K1.1. In doing so, however, the court acknowledged the potential for an argument as made here by Wade:

> We believe that in an appropriate case the district court may be empowered to grant a departure notwithstanding the government's refusal to motion the sentencing court if the defendant can establish the fact of his substantial assistance to authorities as outlined above. Nevertheless, we are not prepared to decide this issue based on the record currently before us.
>
> Thus, while we are inclined to hold that a motion by the government may not be necessary in order for the sentencing court to consider a departure based on substantial assistance to authorities, we need not reach this issue.

Id. at 668-69. Justice's argument was based on the notion that 28 U.S.C. § 994(n) directs the Commission to "assure" that the Sentencing Guidelines recognize substantial assistance, and if U.S.S.G. § 5K1.1 were interpreted to deny the court's review of the government's determinations on this issue, the Congressional mandate could be frustrated. The court left the issue open, citing *United States v. White*, 869 F.2d 822 (5th Cir.), *cert. denied*, 490 U.S. 1112 (1989), where the court observed that although it would be "the rarest of cases" in which the government would improperly fail to recognize substantial assistance, § 5K1.1 "obviously does not preclude a district court from entertaining a defendant's showing that the government is refusing to recognize such substantial assistance." *Id.* at 829.

The Eighth Circuit revisited the question in *United States v. Smitherman*, 889 F.2d 189 (8th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 1493 (1990), and again acknowledged the possibility that it would be willing to review a government's refusal to make a motion for a downward departure in the right circumstances.

> In this case, the government made no such motion. Although we have suggested that a section 5K1.1 motion might not be necessary in all cases [*citing United States v. Justice*], we do not view the present case as one that presents a question of prosecutorial bad faith or arbitrariness that might conceivably present a due process issue.

Id. at 191.

Our reading of 18 U.S.C. § 3553(a) and 28 U.S.C. § 994(n), however, leads us to the conclusion that the government alone has the right to decide, in its discretion, whether to file a motion for a downward departure based on the substantial assistance of a defendant. The statutory purpose of promoting defendants' cooperation with the government and the statutory restriction that departures may be considered only on the motion of the government require an interpretation that the right to introduce flexibility into what is otherwise a mandatory sentence is given to the government for use as a prosecutorial tool which may be exercised in the sole discretion of the government. Moreover, neither 18 U.S.C. § 3553(e) nor 28 U.S.C. § 994(n) bestows on a defendant a beneficial interest that may be enforced as a right. By giving the right to request a downward departure from mandatory minimum sentences exclusively to the government, § 3553(e) of logical necessity excludes any claim of right by a defendant to demand that a motion for a departure be filed upon his unilaterally initiated cooperative efforts. *See United States v. Daniels*, 929 F.2d 128, 131 (4th Cir. 1991) ("In the absence of an agreement requiring the government to file [a § 5K1.1 motion for substantial assistance] the defendant has no right to demand that one be filed.").

Once we reach the conclusion that the government has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion. To conclude otherwise would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government.

The avenue open to a defendant for taking advantage of 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 is to negotiate a plea agreement with the government under which the defendant agrees to provide valuable cooperation for

the government's commitment to file a motion for a downward departure. When a defendant is able to negotiate a plea agreement that includes the government's agreement to file a motion for a downward departure under § 5K1.1, the defendant obtains rights to require the government to fulfill its promise. To those circumstances we apply the general law of contracts to determine whether the government has breached the agreement. *See United States v. Connor*, 930 F.2d 1073, —— (4th Cir. 1991). If substantial assistance is provided and the bargain reached in the plea agreement is frustrated, the district court may then order specific performance or other equitable relief, or it may permit the plea to be withdrawn. *Id.* at ——. *Cf. Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

While the government may have legitimate prosecutorial interests in choosing to negotiate a plea agreement and settle a prosecution with a defendant short of trial, it may also insist on a full prosecution and trial if it chooses not to negotiate or agree to terms of a plea agreement satisfactory to the defendant. The defendant's right is to be prosecuted and tried in accordance with the standards of due process and not to be given an agreement of compromise.

We therefore hold that, absent a motion filed by the government, the district court has no authority to depart downward from a mandatory minimum sentence for the substantial assistance of the defendant, and the defendant is not entitled to an explanation for the government's refusal to make the motion or for its refusal to enter into an agreement to make the motion. The judgment of the district court is therefore affirmed.

AFFIRMED

SUPREME COURT OF THE UNITED STATES

No. 91-5771

HAROLD RAY WADE,
Petitioner

v.

UNITED STATES

ORDER ALLOWING CERTIORARI

Filed December 9, 1991

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

December 9, 1991

No. 91-5771

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HAROLD RAY WADE, JR.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether, absent a relevant provision in a plea agreement, a federal district court has any power to review a prosecutor's refusal to file a motion for reduction of sentence based on a defendant's substantial assistance?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-5771

HAROLD RAY WADE, JR.,
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BRIEF FOR THE PETITIONER

For the reasons set forth below, petitioner requests that this Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit and remand this matter to the District Court for further consideration of the reasons behind the prosecutor's refusal to move for a downward departure.

OPINION BELOW

The opinion of the Court of Appeals is reported at 936 F.2d 169 (4th Cir. 1991) (J.A. 23-29). There is no District Court opinion, but the District Court's holding appears at J.A. 9-10.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on June 12, 1991 (J.A. 23). Petitioner filed his Petition for Writ of Certiorari on September 10, 1991

(J.A. 30). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND GUIDELINES INVOLVED

18 U.S.C. § 3553(e) provides:

> Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

28 U.S.C. § 994(n) provides:

> The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

United States Sentencing Commission Manual section 5K1.1 (Policy Statement) (Nov. 1990) provided:

> § 5K1.1 *Substantial Assistance to Authorities* (Policy Statement)
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include,

> but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

STATEMENT OF THE CASE

Petitioner was arrested by federal authorities for involvement in drug trafficking. Following his arrest, he began to cooperate with the authorities, anticipating that the government would accord him leniency in exchange (J.A. 24). Petitioner's assistance proved valuable to the government, resulting in the identification and conviction of several other individuals (J.A. 24).

Petitioner later pleaded guilty, without benefit of a plea agreement, to federal drug and firearms charges that together carried a statutorily-mandated minimum sentence of 15 years' imprisonment (J.A. 16). For reasons that were not explored by the trial court, and remain unknown at this time, the prosecutor did not choose to recognize petitioner's cooperation by moving for a downward departure pursuant to 18 U.S.C. § 3553(e) or U.S.S.G. § 5K1.1.[1] At sentencing, petitioner's counsel ap-

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[1] The presentence report noted that prior to sentencing, petitioner wrote a letter urging another man falsely to claim owner-

prised the District Court of his cooperation and attempted to inquire of the prosecutor why he refused to make a substantial assistance motion (J.A. 8-9). The District Court refused to entertain this inquiry, holding that it lacked authority both to inquire into the reasons for the prosecutor's failure to make a substantial assistance motion and to consider petitioner's cooperation absent such a motion (J.A. 9-10). "Well, I believe I'm going to let you make some law with that case because I do not believe so, and I hold that I do not have that authority." (J.A. 9). The District Court then imposed the statutory minimum sentence on each count (J.A. 18).

The Court of Appeals affirmed (J.A. 23-29). As an initial matter, the Court of Appeals held that the District Court lacked authority under § 3553(e) to depart below the statutory minimum sentence in the absence of a motion from the government (J.A. 24-26). The Court of Appeals then held that although there was "no disagreement" that petitioner had in fact "provided valuable assistance to the government," the District Court had no power whatsoever to review the reasons for the prosecutor's refusal to make a substantial assistance motion, absent a plea agreement requiring the government to do so (J.A. 24, 26-28). The Court of Appeals reasoned that because § 3553(e) gives the prosecutor "sole discretion in deciding whether to file a motion for downward departure for substantial assistance," neither the defendant nor the

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ship of the firearms. Undoubtedly, the government will argue that this action alone constituted sufficient grounds for the prosecutor's refusal to file a substantial assistance motion, and that the District Court's refusal to inquire into the reasons for that decision was therefore harmless error, if error at all. This is a specious argument: the actual propriety of the prosecutor's refusal to move for departure is not before this Court. The only question properly before this Court is whether the District Court had the legal authority to inquire into the reasons for that refusal. The actual validity of those reasons is a question to be addressed in the first instance by the District Court on remand.

court may "inquire into the government's reasons and motives if the government does not make the motion." (J.A. 28). Permitting judicial review of that decision, the Court of Appeals concluded, "would result in undue intrusion by the courts into the prosecutorial discretion granted by the statute to the government." (J.A. 28).

SUMMARY OF ARGUMENT

18 U.S.C. § 3553(e) gives federal prosecutors the discretion to decide which defendants are entitled to have their cooperation with authorities considered as a possible basis for reduction of sentence below a statutory minimum. The Fourth Circuit has held that this provision strips the federal courts of all power to review the prosecutor's exercise of that discretion, even when presented with credible allegations of racial animus, intent to retaliate for exercise of protected rights, or some other blatantly unconstitutional conduct. In so doing, the Fourth Circuit places the conduct of prosecutors in a critical aspect of federal criminal proceedings effectively beyond the reach of the Constitution. The ruling is unprecedented: no other determination in all of the federal criminal justice system is similarly immune from judicial scrutiny.

The Fourth Circuit's ruling ignores a long line of decisions from this Court, which unequivocally establish that even decisions committed to the sole discretion of the prosecutor—*e.g.*, the decisions whether to prosecute and how to charge—remain subject to the limited judicial review necessary to ensure that the prosecutor is not exercising his discretion in an unconstitutional manner. *See, e.g., Wayte v. United States*, 470 U.S. 598 (1979) (reviewing prosecutor's charging decisions for alleged equal protection and first amendment violations). The prosecutor's substantial assistance decisions should be subject to judicial review under the same limited standards.

The Fourth Circuit's holding reflects a disturbingly narrow view of the federal courts' inherent power to supervise proceedings before them. As this Court has long recognized, that power necessarily extends to policing the conduct of prosecutors in federal criminal proceedings. *E.g., United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Hale*, 422 U.S. 171, 180 & n.7 (1975). The Fourth Circuit holds here, however, that a federal court has absolutely no power to review a prosecutor's refusal to make a substantial assistance motion, even when presented with credible allegations that the prosecutor acted with unconstitutional or otherwise illegal motives. This holding threatens not only the rights of criminal defendants, but also the integrity of federal criminal proceedings themselves. This Court should not tolerate such unprecedented abdication of the federal courts' inherent power—and corresponding duty—to uphold the Constitution and maintain the integrity of the federal judicial system.

Nothing in the statute itself supports the Fourth Circuit's total ban on judicial review of the prosecutor's substantial assistance decisions. Indeed, the statute is completely silent—and thus decidedly ambiguous—on the issue of judicial review. Ignoring basic principles of statutory construction, the Fourth Circuit resolves that ambiguity in a way that will undermine the statute's central purpose: the elimination of "'unwarranted sentencing disparities among defendants with similar records.'" *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (quoting 28 U.S.C. § 991(b)(1)). The Fourth Circuit's interpretation of the statute also conflicts with the way this Court has interpreted congressional silence in analogous situations, *see Burns v. United States*, —— U.S. ——, 111 S.Ct. 2182 (1991), and violates the well-established rule that federal statutes must be construed, where "fairly possible," to "avoid serious doubt of their constitutionality." *International Association of Machinists v. Street*, 367 U.S. 740, 749-50 (1961).

Subjecting the prosecutor's substantial assistance decisions to the limited judicial review currently available for other matters committed to prosecutorial discretion will not unduly interfere with the prosecutor's exercise of his duties or impose an undue burden on the federal courts. To allow such review is not to say that a federal district court should lightly exercise its supervisory power to interfere with prosecutorial decisions. Here, as in review of the prosecutor's charging decisions, judicial inquiry must be guided and confined by a proper respect for the autonomy of a co-equal branch of government. *See Wayte*, 470 U.S. at 608. But such separation of powers concerns are reduced where, as here, the challenged prosecutorial decision is one made in the course of an ongoing judicial proceeding. In this context, the federal court's own interest in preserving the integrity of the proceedings before it requires that it retain some limited powers of review. The Constitution demands no less of Article III courts.

For the above reasons, the judgment below should be reversed and the case remanded for consideration of petitioner's allegations of prosecutorial misconduct.

ARGUMENT

The Sentencing Reform Act of 1984 (the Act), as amended, 18 U.S.C. §§ 3551 *et seq.* and 28 U.S.C. §§ 991-998, allows a defendant's cooperation with the authorities to be taken into account in sentencing in certain circumstances. 18 U.S.C. § 3553(e), the provision at issue in this case, provides that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The Act also provides that the Sentencing Commission "shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 28 U.S.C. § 994(n).

To implement its statutory mandate, the Sentencing Commission has promulgated a Policy Statement governing all downward departures from guideline sentencing for substantial assistance. *See* U.S.S.G. § 5K1.1 (Policy Statement) (allowing the court to "depart from the guidelines" "[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense"). The "upon motion of the government" language in § 3553(e) and § 5K1.1 is identical, and the lower courts have treated the two provisions as interchangeable for purposes of analyzing this requirement. *See, e.g., United States v. Hayes*, 939 F.2d 509, 511 (7th Cir. 1991), *cert. denied*, ——U.S. ——, —— S.Ct. ——, 1991 U.S.L.W. 23546 (Jan. 12, 1992) (No. 91-6364).

Because the charges brought in this case carried statutorily-mandated minimum sentences, the district court's power to depart downward for substantial assistance was governed *both* by § 3553(e), which specifically authorizes departures below a statutory minimum, and by the more general Policy Statement, which applies to all departures below the applicable guideline range. *See United States v. Keene*, 933 F.2d 711, 713-714 (9th Cir. 1991) (explaining overlap between § 3553(e) and § 5K1.1). The Court of Appeals recognized that the two provisions overlapped here, but treated the more specific statutory provision as controlling (J.A. 25) ("5K1.1 governs all departures from guideline sentencing for substantial assistance, and its scope includes departures from mandatory minimum sentences permitted by 18 U.S.C. § 3553 (e)"). Petitioner therefore limits his argument before this Court to the statutory provision.[2]

The federal Courts of Appeals have consistently held that § 3553(e) conditions a District Court's authority to depart downward for a defendant's substantial assistance

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[2] Though both § 3553(e) and Policy Statement 5K1.1 are applicable in this case, petitioner initially framed the question presented in terms of § 5K1.1, the broader provision. Cert. Pet. ii. A proposed amendment to § 5K1.1, published after the grant of certiorari in this case, would remove the government motion requirement except in cases also covered by § 3553(e). Notice of Proposed Amendment to § 5K1.1 of the United States Sentencing Comm'n Manual, 57 Fed. Reg. 90-01 (1992) (proposed Jan. 2, 1992). Petitioner has therefore rephrased the question presented to confine inquiry to the interpretation of § 3553(e), which serves as statutory authority for § 5K1.1 but cannot be altered by the proposed amendment. *See* Sup. Ct. Rule 24.1(a) (question presented includes all issues fairly implicit in the question listed in petition for certiorari, and may be rephrased to make these issues explicit). Should Congress reject the proposed amendment to § 5K1.1 and elect to retain the government motion language in that provision, this Court's ruling on the § 3553(e) issue in this case should also control in situations where § 5K1.1 alone applies, because the government motion requirements in the two provisions are identical.

upon a government motion.[3] The Fourth Circuit agreed with this reading of the statute (J.A. 26), and petitioner does not challenge that holding her Petitioner challenges only the Fourth Circuit's second holding: that the prosecutor's refusal to make a § 3553(e) motion in a particular case is utterly beyond judicial review, absent a plea agreement (J.A. 26-29). That holding is inconsistent with a long line of this Court's precedents making clear that even decisions committed to prosecutorial discretion remain subject to the limited judicial review necessary to ensure that the prosecutor is not exercising his discretion in an unconstitutional manner. The Fourth Circuit's holding is not required by the statutory language, undermines the statute's purpose, and raises serious constitutional problems: it should therefore be reversed.

I. DECISIONS COMMITTED TO THE DISCRETION OF THE PROSECUTOR ARE NONETHELESS SUBJECT TO LIMITED JUDICIAL REVIEW.

The American criminal justice system has traditionally committed certain key decisions to the discretion of the prosecutor. Most prominent among these are the decisions whether to prosecute, *see United States v. Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); and if so, what charges to press, *see Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (deciding "what charge to file or bring before a grand jury . . . generally rests entirely in [the prosecutor's] discretion").

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[3] *See, e.g., United States v. Kuntz*, 908 F.2d 655, 657 (10th Cir. 1990); *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990); *United States v. Huerta*, 878 F.2d 89, 91 (2d Cir. 1989), *cert. denied*, 493 U.S. 1046 (1990); *United States v. Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989), *cert. denied*, 493 U.S. 1047 (1990).

Like any other power conferred upon the Executive Branch, however, this prosecutorial discretion "'is not unfettered,'" but remains "'subject to constitutional constraints.'" *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979)); *see Bordenkircher*, 434 U.S. at 365 ("broad through [prosecutorial] discretion may be, there are undoubtedly constitutional limits upon its exercise"). As this Court has recognized repeatedly, these "constitutional limits" include the guarantees of fair and equal treatment contained in the Due Process Clause of the Fifth Amendment. Although the prosecutor is permitted "the conscious exercise of some selectivity" in his enforcement of the criminal laws, *Oyler v. Boles*, 368 U.S. 448, 456 (1962), equal protection principles forbid him to "deliberately base" those discretionary decisions "upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)); *see Batchelder*, 442 U.S. at 125 n.9; *Two Guys from Harrison-Allenton, Inc. v. McGinley*, U.S. 582, 588 (1961). Similarly, the Due Process Clause forbids the prosecutor to use his discretion to punish a defendant for "exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (citing *Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort")); *see also Blackledge v. Perry*, 417 U.S. 21, 27 (1974) (same).

To safeguard these constitutional guarantees, this Court has long held that the federal courts may review even those decisions committed to the sole discretion of the prosecutor for the limited purpose of ensuring that the prosecutor is not exercising his discretion in an unconstitutional manner. *See Wayte*, 470 U.S. at 608-14 (reviewing United States Attorneys' charging decisions for alleged equal protection and first amendment viola-

tions); *Goodwin*, 457 U.S. at 384-85 & n.19. (United States Attorney's charging decision may be reviewed for vindictive motivation that violates due process); *Blackledge*, 417 U.S. at 24-30 (same). A contrary holding would place the prosecutor's actions beyond the reach of the Constitution and reduce the constitutional guarantees of due process and equal protection to empty platitudes.

Like the decisions whether and how to prosecute, the decision to seek a downward departure for substantial assistance is committed by statute to the discretion of the prosecutor. *Compare, e.g.*, 28 U.S.C. § 547 (giving United States Attorney power to "prosecute for all offenses against the United States") *with* 18 U.S.C. § 3553 (e) (giving prosecutor power to initiate consideration of defendant's cooperation at sentencing). As such, it is *generally* beyond judicial interference. But like other matters committed to prosecutorial discretion, it must remain subject to the *limited* judicial review necessary to ensure that the prosecutor is not exercising his discretion in an unconstitutional manner. *See Wayte*, 470 U.S. at 608.[4] The Fourth Circuit's refusal to permit this limited review places the prosecutor's decision on this important aspect of sentencing completely beyond the reach of the Constitution. No other decision in the federal criminal justice system is similarly immune from constitutional scrutiny.

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[4] The government agrees that the discretion granted the prosecutor by § 3553(e) is "akin to . . . [that] enjoyed by the government in determining whether to prosecute, or what charges to bring." Brief of United States in Opposition to Petition ("Cert. Opp.") at 5-6 (citations omitted). Having conceded the analogy, though, the government refuses to accept its logical conclusion: that the decision not to seek a downward departure must be subject to the same sort of limited judicial review as those other prosecutorial decisions. *See id.* at 6 ("[T]he government's decision not to file a 'substantial assistance' motion is not subject to judicial review").

II. A FEDERAL DISTRICT COURT'S INHERENT POWER TO CONTROL THE CONDUCT OF ATTORNEYS IN PROCEEDINGS BEFORE IT GIVES IT POWER TO REVIEW THE PROSECUTOR'S DECISION NOT TO FILE A SUBSTANTIAL ASSISTANCE MOTION.

It is settled law that the federal trial courts have the inherent power to supervise the conduct of proceedings before them. *See, e.g., Chambers v. NASCO, Inc.*, —— U.S. ——, 111 S.Ct. 2123, 2132-33 (1991) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980); *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962); *see also Bank of Nova Scotia v. United States*, 487 U.S. 250, 264 (1988) (SCALIA, J., concurring) ("every United States court has an inherent supervisory authority over the proceedings conducted before it"). This "supervisory" power is derived not from "rule or statute but [from] the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31; *see Hudson*, 11 U.S. (7 Cranch) at 34 ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution," because "they are necessary to the exercise of all others").

As this Court has often recognized, a federal court's inherent power gives it the right to supervise the conduct of prosecutors in federal criminal proceedings before it. *See, e.g., United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Hale*, 422 U.S. 171, 180 & n.7 (1975); *see also Bank of Nova Scotia*, 487 U.S. at 254; *id.* at 264 (SCALIA, J., concurring) (federal district court's "inherent supervisory authority" extends to monitoring prosecutors' "performance before the court"). The court may use this power to demand that federal prosecutors adhere not only to the standards of conduct actually required by the Constitution, but also to

those the court deems necessary to preserve the integrity of federal criminal proceedings. *See McNabb v. United States*, 318 U.S. 332, 340 (1943) (Frankfurter, J.) ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure," which "are not satisfied merely by observance of those minimal historic safeguards . . . summarized as 'due process of law' "); *Hasting*, 461 U.S. at 505 (court may use its supervisory power to remedy violation of a defendant's "recognized rights," to "preserve [the] integrity" of federal criminal proceedings before it, and to "deter illegal conduct" by government agents).[5]

A federal district court's inherent supervisory power gives it the authority to inquire into the reasons why the prosecution refuses to file a substantial assistance motion in a particular case. Such an inquiry is necessary to ensure that the prosecutor's conduct does not actually violate the defendant's constitutional rights: that it is not based on race, religion, sex, exercise of protected constitutional or statutory rights, or other arbitrary and irrational reasons. It is also necessary to preserve the integrity of federal criminal proceedings, which is directly threatened by improper or unconstitutional behavior by prosecutors. As the Second Circuit has explained in an analogous situation, "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for

[5] *See also United States v. Samaniego*, 607 F.2d 877, 881 (9th Cir. 1979) (federal district court may use its "inherent supervisory powers" to "protect the integrity of the judicial process . . . from unfair or improper prosecutorial conduct"); *United States v. Basurto*, 497 F.2d 781, 793 (9th Cir. 1974) (Hufstedler, J., concurring) ("An important function of [the federal courts'] supervisory power is to guarantee that federal prosecutors act with due regard for the integrity of the administration of justice").

determining its applicability." *United States v. Berrios*, 501 F.2d 1207, 1209 (2d Cir. 1974). Finally, such review is necessary to deter future illegal or improper conduct by prosecutors, whose decisions should not remain forever shuttered from the watchful eye of the court. *See Hasting*, 461 U.S. at 505.

III. 18 U.S.C. § 3553(e) DOES NOT PRECLUDE LIMITED JUDICIAL REVIEW OF THE PROSECUTOR'S DECISION NOT TO FILE A SUBSTANTIAL ASSISTANCE MOTION.

Contrary to the Fourth Circuit's conclusion, nothing in the Act itself precludes the limited judicial review described above. While § 3553(e) grants a federal district court express authority to depart downward for substantial assistance only upon motion from the government, it says nothing whatsoever about the district court's power to review the government's decision not to file such a motion. The Fourth Circuit apparently inferred that Congress' failure explicitly to provide for such review was intended affirmatively to deny it. Under traditional canons of statutory construction long adhered to by this Court, however, Congress' silence on the issue of judicial review cannot be interpreted to forbid it.

Just last Term, this Court refused to hold that congressional silence on another aspect of guidelines procedure was intended affirmatively to deny defendants procedural protections traditionally accorded them in analogous situations. *Burns v. United States*, —— U.S. ——, ——, 111 S.Ct. 2182, 2186-88 (1991) (Congress' failure expressly to require notice to the parties before an upward departure from guidelines range did not signify an intent to deny them such notice). As the Court explained in *Burns*, congressional intent to "rule out" a particular procedure cannot be inferred from its failure expressly to provide for that procedure, where such an interpretation would be "inconsistent with [the statute's] purpose,"

"completely opposite to the meaning that this Court has attached to silence in a variety of analogous settings," and would require the Court to confront a "serious constitutional problem." *Id.*, at ——, 111 S.Ct. at 2186-87. In such cases, congressional silence should not be interpreted as "rul[ing] out a particular statutory application," but as "signif[ying] merely an expectation that nothing more need be said" on the subject. *Id.* at ——, 111 S.Ct. at 2186. Application of accepted canons of statutory construction leads to a similar conclusion in this case.

First and foremost, reading § 3553(e) to preclude all judicial review of the prosecutor's decision not to file a substantial assistance motion would undermine one of the central purposes of the Act: the elimination of "'unwarranted sentencing disparities among defendants with similar records.'" *Mistretta v. United States*, 488 U.S. 361, 374 (1989) (quoting 28 U.S.C. § 991(b)(1)).[6] As Congress expressly recognized in 28 U.S.C. § 994(n), a defendant's cooperation is an important aspect of his record that should be taken into account in fixing his sentence. If such cooperation can result in a sentence below the statutory mimimum only upon government motion, and the government's decision not to file such a motion is completely beyond judicial review, then defendants who have given substantially equivalent levels of assistance to the authorities and whose records are otherwise equivalent may receive significantly different sentences, depending on the policy and prejudices of the particular prosecutor involved:[7]

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[6] *See also* S. Rep. No. 90-225 (1983), at 49; U.S.S.G. Ch. 1, Pt. A, intro. 3 (one of the Act's main objectives was to ensure "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders").

[7] The standards used to determine whether a defendant's cooperation merits a motion for reduction of sentence vary widely from one United States Attorney's Office to another. *See, e.g., United States v. Donatiu*, 922 F.2d 1331, 1335 (7th Cir. 1991) (defendant must "actually help" in the prosecution of another defendant); *United States v. Chotas*, 913 F.2d 897, 902 (11th Cir. 1990) (Clark, J., concurring in part and dissenting in part) (defendant must "accept responsibility for his participation in the crime"), *cert. denied*, —— U.S. ——, 111 S.Ct. 1421 (1991); *United States v. Curran*, 724 F. Supp. 1239, 1241 (C.D. Ill. 1989) (defendant must participate in covert operations, among other things); *United States v. Coleman*, 707 F. Supp. 1101, 1105-06 (W.D. Mo. 1989) (local United States Attorney has a flat "policy" of not filing any substantial assistance motions), *rev'd on other grounds*, 895 F.2d 501 (8th Cir. 1990).

(1) Some will have their cooperation rewarded by sentences below the statutory minimum, including the possibility of probation;

(2) others will receive sentences between the statutory minimum and the bottom of the guideline range; and

(3) still others will receive sentences within the guideline range only.

The courts will remain powerless to correct such arbitrary differences in sentences, and the congressional goal of eliminating sentence disparity will be frustrated.[8]

Moreover, reading § 3553(e)'s language to preclude even limited judicial review of the prosecutor's decision not to seek a downward departure would be "completely opposite to the meaning that this Court has attached to silence in a variety of analogous settings." *Burns*, —— U.S. at ——, 111 S.Ct. at 2187. Statutes giving prosecutors sole discretion to initiate prosecutions and select charges typically contain no language expressly authorizing judicial review of those discretionary decisions. *See*,

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[8] *See Keene*, 933 F.2d at 715 (absence of judicial review of prosecutor's decision "could well frustrate Congress' goal of eliminating sentence disparity"); *Chotas*, 913 F.2d at 905 (Clark, J., concurring in part and dissenting in part) (making prosecutor's decision unreviewable would be "grossly inconsistent with the [statutory] goal of reducing sentencing disparity").

e.g., 28 U.S.C. § 547 (powers of United States Attorneys). But this Court has never construed such legislative silence as precluding the limited judicial review required to ensure that the prosecutor does not exercise his statutory discretion in an unconstitutional manner. *See, e.g., Wayte*, 470 U.S. at 608-14; *Goodwin*, 457 U.S. at 384-85 & n.19.

Finally, reading § 3553(e) as the government suggests would violate the venerable rule that a federal statute "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916); *see International Assoc. of Machinists v. Street*, 367 U.S. 740, 749 (1961) ("[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality").[9] This canon of statutory construction "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, —— U.S. ——, ——, 111 S.Ct. 1759, 1771 (1991) (citing *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-07 (1924)). It requires that "every reasonable construction . . . be resorted to in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Where, as here, "the language of the statute is decidedly ambiguous," this Court's "duty to avoid passing unnecessarily upon important constitutional questions is strongest," for it is "both logical and eminently prudent to assume that when Congress intends to press the limits of constitutionality in its enactments, it will express that intent in explicit and unambiguous terms." *Rust*, —— U.S. at ——, 111 S.Ct. at 1779-80 (BLACKMUN, J., dissenting); *see also DeBartolo Corp.*, 485 U.S. at 575 ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

[9] Construing § 3553(e) as the government suggests would also violate the settled maxim that ambiguities in criminal statutes must be resolved in favor of the accused. *See United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). As this Court has often explained, this "rule of lenity" applies to ambiguities in sentencing provisions as well as substantive ones. *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Batchelder*, 442 U.S. at 121; *Simpson v. United States*, 435 U.S. 6, 14-15 (1978). That § 3553(e) is at least ambiguous on the question of judicial review cannot seriously be doubted, as the conflict in the Courts of Appeals which prompted the grant of certiorari in this case vividly demonstrates. *See infra* n.13; *see also Rust v. Sullivan*, —— U.S. ——, 111 S. Ct. 1759, 1767 (1991) (statutory language is "ambiguous" on a particular issue when it "does not speak directly to" that issue). Accordingly, the rule of lenity requires a construction that does not preclude judicial correction of the government's improper refusal to file a substantial assistance motion in a particular case.

This principle is fully applicable here. As several courts have recognized,[10] construing the government motion requirement to forbid all judicial review of the prosecutor's decision not to file a substantial assistance motion would

[10] *See, e.g., United States v. Doe*, 934 F.2d 353, 362-63 (D.C. Cir.) (D.H. Ginsburg, J., concurring) (5K1.1) (characterizing this constitutional question as one whose resolution is "far from clear," "difficult[]," and worthy of this Court's attention), *cert. denied*, —— U.S. ——, 112 S.Ct. 268 (1991); *United States v. Justice*, 877 F.2d 664, 667-69 (8th Cir.) (5K1.1), *cert. denied*, 493 U.S. 958 (1989); *United States v. Gutierrez*, 908 F.2d 349, 352, 354-55 (8th Cir.) (Heaney, J., dissenting) (5K1.1), *vacated*, 917 F.2d 379 (8th Cir. 1990) (en banc) (mem.) (affirming by an equally divided vote, without opinion, the decision of the District Court); *United States v. Roberts*, 726 F. Supp. 1359, 1374-75 (D.D.C. 1989) (3553(e) and 5K1.1) ("It is difficult to conceive of a parallel situation in the law where substantial liberty interests and consequences provided for by statute are beyond the power of inquiry by anyone."), *rev'd on other grounds sub nom. United States v. Doe, supra; Curran*, 724 F. Supp. at 1241-45 (3553(e) and 5K1.1).

raise a serious constitutional problem: whether the Due Process Clause of the Fifth Amendment permits Congress to commit a decision with such a significant impact on a defendant's sentence to the utterly unreviewable authority of his adversary, the prosecutor. This constitutional problem is analytically distinct from the more general due process challenge typically mounted to the government motion requirement itself. That challenge, uniformly rejected by the Courts of Appeals is that the government motion requirement improperly limits the situations in which the sentencing court can consider the defendant's cooperation.[11]

Petitioner does not raise a general due process challenge to the government motion requirement here. Instead, he contends only that even if the government motion requirement itself is not constitutionally offensive, interpreting that requirement *to forbid all judicial review of the prosecutor's decision* not to file a substantial assistance motion would render the statute unconstitutional under the procedural component of the Due Process

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[11] The traditional due process challenge to the government motion requirement of § 3553(e) and Policy Statement 5K1.1 has been a substantive rather than procedural one: that it improperly limits the situations in which a sentencing court may consider cooperation with the authorities, in derogation of the defendant's right to present mitigating evidence at sentencing and to obtain an individualized, judicially-crafted sentence. *See, e.g., United States v. La Guardia*, 902 F.2d 1010, 1015-17 (1st Cir. 1990); *Doe*, 934 F.2d at 356-58. The Courts of Appeals have uniformly rejected this argument, in all of its various guises, reasoning essentially as follows: Congress has the constitutional power to eliminate all sentencing discretion and establish mandatory sentences for all non-capital crimes. It therefore has the power to take the lesser step of limiting the factors a court may consider in fixing sentences for those crimes, *e.g.*, by forbidding consideration of a defendant's cooperation. Because defendants therefore have no constitutional right to have their cooperation considered at all, they cannot complain that the government motion requirement improperly limits the situations in which the court can consider it. *See, e.g., id.* (colleting cases).

Clause.[12] *Compare* Brief of National Association of Criminal Defense Lawyers As Amicus Curiae Supporting Petitioner (filed Jan. 23, 1992) (raising procedural due process challenges to both the government motion requirement and a construction of the statute that precludes all judicial review of the prosecutor's decision).

The gravity of this constitutional problem is readily apparent.[13] It has long been "clear that the sentencing

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[12] The government attempts to blur the distinction between the two types of challenges, citing various decisions rejecting substantive due process challenges to the government motion requirements of § 3553(e) and Policy Statement 5K1.1 as support for the entirely separate proposition that "the government's decision not to file a 'substantial assistance' motion is not subject to judicial review." Cert. Opp. at 6 & n.4.

[13] Indeed, the problem is so obvious that ten of the twelve Courts of Appeals have refused to accept the government's position that § 3553(e) and Policy Statement 5K1.1 totally preclude all judicial review of the prosecutor's refusal to file a substantial motion (absent a controlling provision in a plea agreement).

One Circuit allows a review that appears to be completely open-ended. *See United States v. Paden*, 908 F.2d 1229, 1234 (5th Cir. 1990) (5K1.1) ("The absence of a government motion . . . 'does not preclude the district court from entertaining a defendant's showing that the government is refusing to recognize [his] substantial assistance.'"). Five Circuits allow a limited review for "bad faith or arbitrariness" sufficient to constitute a substantive due process violation. *See United States v. Agu*, 949 F.2d 63 (2d Cir. 1991) (5K1.1); *United States v. Hubers*, 938 F.2d 827, 829 (8th Cir.) (5K1.1), *cert. denied*, —— U.S. ——, 112 S.Ct. 427 (1991); *United States v. Mena*, 925 F.2d 354, 455-56 (9th Cir. 1991) (5K1.1); *United States v. Vargas*, 925 F.2d 1260, 1267 (10th Cir. 1991) (5K1.1); *United States v. Villarino*, 930 F.2d 1527, 1530 (11th Cir. 1991) (5K1.1). Two Circuits permit a similarly limited review "under the same standards currently employed by district courts to review other matters committed to prosecutorial discretion": to ensure that the prosecutor's decision is not based "upon an unjustifiable standard such as race, religion, or other arbitrary classification" or intended "to penalize a defendant for exercising his legally protected rights." *United States v. Doe*, 934 F.2d 353,

process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Although a defendant has no right to a particular sentence, he "has a legitimate interest in the character of the procedure which leads to the imposition of sentence." *Id.* 18 U.S.C. § 3553(e) makes the potential range of a defendant's sentence turn on the resolution of a single dispositive issue: whether he has provided "substantial assistance" to the authorities. Giving the prosecutor unreviewable authority to resolve this issue would violate a cardinal tenet of due process: that a criminal defendant has the right to have a neutral and unbiased decisionmaker finally resolve all questions that may result in a significant restraint on his liberty.

As this Court explained, "[w]hen the stakes are this high, the detached judgment of a neutral [decisionmaker] is essential . . . to furnish meaningful protection from unfounded interference with liberty." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Applying this rule, this Court has consistently held prosecutors and other executive officers are not sufficiently "neutral" to make final determinations on issues that may have a significant impact on a defendant's liberty. *See, e.g., Gerstein*, 420 U.S. at 114 (determination whether there is probable

361 (D.C. Cir.) (5K1.1), *cert. denied*, —— U.S. ——, 112 S.Ct. 268 (1991); *United States v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991) (5K1.1) (same). Another Circuit has suggested in dicta that it would follow *Doe* and *Bayles*. *United States v. Romolo*, 937 F.2d 20, 24 n.4 (1st Cir. 1991) (5K1.1). Still another has expressly reserved the question "whether a prosecutor's arbitrary or bad faith refusal" to file a 3553(e) motion may be reviewable as a due process violation. *United States v. Gardner*, 931 F.2d 1097, 1099 n.4 (6th Cir. 1991). Only one Circuit, the Third, appears to agree with the Fourth Circuit's conclusion that a district court has no power whatsoever to review a prosecutor's refusal to file a substantial assistance motion absent an applicable provision in a plea agreement. *See United States v. Gonzales*, 927 F.2d 139, 145-46 n.5 (3d Cir. 1991) (5K1.1).

cause to hold defendant for trial must be made by judge, not by prosecutor); *Shadwick v. City of Tampa*, 407 U.S. 345, 348-51 (1972) (determination whether there is probable cause for issuance of arrest warrant must be made by "neutral and detached judicial officer"); *Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972) (preliminary determination whether conditions of parole have been violated must be made by "independent decisionmaker" who is "not directly involved in the case," rather than by supervising parole officer).

The same result obtains here. The decision whether to consider substantial assistance as a basis for reduction in sentence can have a significant effect on a defendant's liberty. The Due Process Clause therefore requires that this decision be finally determined by a neutral and detached decisionmaker. Just as the prosecutor in *Gerstein* could not be called "neutral and detached" on probable cause issues, so the prosecutor here cannot be considered "independent" and "impartial" on sentencing issues. Accordingly, the Due Process Clause will not permit Congress to vest him with ultimately unreviewable authority to make the "substantial assistance" determination.[14]

Though this constitutional problem is substantial, this Court need not and should not resolve it to decide this case. Instead, the Court should follow its "time-honored practice" of construing statutes to avoid "reaching constitutional questions unnecessarily," *Rust*, —— U.S. at ——, 111 S.Ct. at 1788 (O'CONNOR, J., dissenting), and

[14] Although the Constitution does not prevent Congress from making a defendant's cooperation totally irrelevant to his sentence, once Congress decides cooperation *is* to be a factor, it may not set up procedures for the consideration of that cooperation that contravene the procedural requirements of the Due Process Clause. *See Doe*, 934 F.2d at 362 (D. Ginsburg, J., concurring). To hold otherwise would be to accept the "bitter with the sweet" argument specifically rejected by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540-41 (1985).

hold that Congress did not intend the government motion requirement to forbid the sort of limited judicial review described above. *See Green v Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (SCALIA, J., concurring in judgment) (when "confronted . . . with a statute which, if interpreted literally," produces a result that is "perhaps unconstitutional," the Court should attempt, where fairly possible, "to give [it] some alternative meaning . . . that avoids this consequence"). Such a construction of § 3553(e) "is not only 'fairly possible,' but entirely reasonable," *Machinists*, 367 U.S. at 750, and proper "respect for Congress," *Rust*, —— U.S. at ——, 111 S. Ct. at 1771, requires that this Court adopt it.

IV. ALLOWING THE LIMITED REVIEW SOUGHT HERE WILL NEITHER UNDULY INTRUDE UPON PROSECUTORIAL DISCRETION NOR IMPOSE AN INTOLERABLE ADMINISTRATIVE BURDEN ON THE FEDERAL COURTS.

The review petitioner seeks is extremely limited. He does not ask this Court to hold that a federal district court may routinely substitute its own judgment for that of the prosecutor on the issue whether the assistance given by a defendant was "substantial." That assessment is one which the prosecutor, as the beneficiary of the assistance given, is uniquely competent to make, and his resolution of it should not be subject to general judicial second-guessing. Petitioner asks this Court only to hold that a federal district court has authority to conduct the limited review necessary to protect the integrity of federal criminal proceedings by ensuring that the prosecutors does not exercise his discretion in an unconstitutional manner: that is, to ensure that his refusal to make a substantial assistance motion is not

(1) "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," in violation of the constitutional guarantee of equal protection, *see Bordenkircher*, 434 U.S. at 364; *Bolling v. Sharpe*, 347 U.S. 497 (1954) (equal protection principles apply to federal government through Fifth Amendment's Due Process Clause);

(2) "motivated by a desire to punish" the defendant "for exercising a protected statutory or constitutional right," in violation of his due process rights, *see Goodwin*, 457 U.S. at 372, 384; or

(3) the result of "bad faith" or "arbitrariness" sufficient to constitute a substantive due process violation, *see United States v. Samango*, 607 F. 2d 877, 881 (9th Cir. 1979) (court may interfere with discretionary decision of prosecutor when it is so "arbitrary and capricious" as to be "violative of due process").

Review of the actual assistance given would be appropriate only to the extent necessary to determine whether its asserted lack of substantiality is merely a "pretext" for some unconstitutional motive that is the "real reason" for the prosecutor's actions.[15]

This limited review will not constitute, as the Fourth Circuit feared, an "undue intrusion by the courts into the . . . discretion granted by the statute to the [prosecutor]" (J.A. 28). As noted above, this Court has long allowed district courts to undertake a similarly limited review of the prosecutor's decisions whether and how to charge, notwithstanding potential separation of powers concerns. The review sought here is much less intrusive: far from inquiring into decisions made by the Executive Branch acting solely within its own domain, the court is

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[15] Of course, review pursuant to *Santobello v. New York*, 404 U.S. 257 (1971), should also be permitted whenever the prosecutor's refusal to make the motion is alleged to violate the terms of a plea agreement. The Courts of Appeals are not in disagreement on this point. *See United States v. Conner*, 930 F.2d 1073, 1075 (4th Cir. 1991) (collecting cases), *cert. denied*, —— U.S. ——, 112 S.Ct. 420 (1991).

examining the propriety of the prosecutor's conduct in an ongoing judicial proceeding. While the separation of powers concerns that constrain judicial review of prosetorial decisions are at their apex prior to indictment, they diminish significantly as the judicial process is invoked and the court's interest in preserving the integrity of its own proceedings is implicated. *Cf. United States v. Torquato*, 602 F.2d 564, 569 & n.10 (3d Cir. 1979).

Nor will the review sought here impose undue administrative burdens upon the federal court system. The lower federal courts have developed a number of procedural mechanisms for allowing defendants to raise the limited challenges to charging decisions already permitted by this Court without undue interference with the prosecutorial function or undue imposition upon the court's time. These include a strong presumption that prosecutorial action is taken in good faith [16] and a requirement that the defendant make a substantial threshold showing in order to obtain discovery or an evidentiary hearing on allegations of prosecutorial misconduct.[17] Taken together, these mechanisms have proved adequate to prevent specious and unsupportable claims of prosecutorial "bad faith" in charging decisions, which can be raised by virtually any defendant, from unduly burdening courts and prosecutors.[18] They should be more than adequate to eliminate similarly specious challenges to § 3553(e) decisions, which can legitimately be raised only by defendants who have cooperated with the authorities.[19]

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[16] *See Torquato*, 602 F.2d at 569.

[17] *See e.g., United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (claim of discriminatory prosecution); *United States v. Jacob*, 781 F.2d 643 (8th Cir. 1986) (same); *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982) (Kennedy, J.) (claim of vindictive prosecution).

[18] *See generally* 2 W. LaFave & J. Israel, *Criminal Procedure*, §§ 13.4 & 13.5 (1984).

[19] This Court need not decide now what remedy a district court should impose if, after a proper inquiry, it finds that a prosecutor has refused to file a § 3553(e) motion for an unconstitutional reason. Because the District Court in this case refused to entertain any inquiry whatsoever into the reasons for the prosecutor's failure to file the motion, there is neither a finding below nor a factual record on that issue. As a result, there is no way for this Court to determine whether the prosecutor's action requires any remedy. The question of the appropriate remedy will arise in this case only if, on remand, the District Court determines that the prosecutor's reasons for refusing to file the motion were in fact improper.

A prosecutor's decision to file a substantial assistance motion can have a significant effect on the defendant's sentence: it can mean the difference between probation and a substantial term of imprisonment. Although the prosecutor has broad discretion in making this decision, the Constitution does not permit him to exercise that discretion in an arbitrary or discriminatory manner. To protect the constitutional rights of defendants and preserve the integrity of federal criminal proceedings, the prosecutor's substantial assistance decision must remain subject to the limited judicial review currently applicable to other decisions committed to prosecutorial discretion. Properly interpreted, § 3553(e) does not preclude such limited judicial review. The Fourth Circuit erred in concluding to the contrary, and its decision should be reversed.[20]

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[20] The government cannot avoid petitioner's right to judicial review by pointing to the absence of any evidence in the record that the prosecutor's motives were improper. *Cf.* Cert. Opp. at 7 (asserting that the reviewability question "is not presented here" because petitioner "has made no showing that the assistance he provided was sufficiently substantial"). The absence of such evidence in the record is not due to petitioner's inability to produce it, but to the District Court's refusal to entertain any allegations of prosecutorial misconduct, much less any evidence to support such allegations. *See* J.A. 10.

Nor can the government avoid petitioner's right to judicial review by pointing to petitioner's alleged obstruction of justice. *See* Cert. Opp. at 7 (asserting that "petitioner cannot reasonably complain that the government acted in bad faith in refusing to file a 'sub-

CONCLUSION

For the reasons given above, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed, and the case remanded to the United States District Court for the Middle District of North Carolina for further consideration of the reasons for prosecutor's refusal to move for a downward departure.

Respectfully submitted,

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stantial assistance' motion," because "the presentence report concluded that [he] obstructed justice"). Because the District Court refused to entertain any inquiry whatsoever into the reasons for the prosecutor's failure to make the motion, petitioner was not allowed to explore the relationship—if any—between that failure and the alleged obstruction of justice. Thus, far from supporting affirmance of the decision below, these alleged "failures of proof" serve only to illustrate the critical need for some inquiry into the reasons why the prosecutor refused to file a section 3553(e) motion.

No. 91-5771

In the Supreme Court of the United States

OCTOBER TERM, 1991

HAROLD RAY WADE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the district court has authority to review the government's decision not to file a motion under 18 U.S.C. 3553(e) or Sentencing Guidelines § 5K1.1 requesting that the court sentence a defendant below the statutory minimum or the Guidelines sentencing range based on the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense."

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OPINION BELOW

The opinion of the court of appeals (J.A. 23-29) is reported at 936 F.2d 169.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1991. The petition for a writ of certiorari was filed on September 10, 1991, and was granted on December 9, 1991. J.A. 30. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND SENTENCING GUIDELINE INVOLVED

1. Section 3553(e) of 18 U.S.C. provides:

> **Limited authority to impose a sentence below a statutory minimum.**—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

2. Section 994(n) of 28 U.S.C. provides:

> The [Sentencing] Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

3. Sentencing Guidelines § 5K1.1 provides:

> **Substantial Assistance to Authorities (Policy Statement)**
>
> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

STATEMENT

Following his guilty plea in the United States District Court for the Middle District of North Carolina, petitioner was convicted of conspiring to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; distributing cocaine and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and using a firearm during a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1). J.A. 16. Petitioner was sentenced to a total of 15 years' imprisonment, to be followed by an eight-year term of supervised release. J.A. 18-19. The court of appeals affirmed. J.A. 23-29.

1. On October 30, 1989, police officers executed a search warrant at petitioner's residence in Gibsonville, North Carolina. After discovering 978 grams

of cocaine, two handguns, and more than $22,000 in cash, the officers arrested petitioner. Following his arrest, petitioner admitted that he and an accomplice, Dwight Marks, had traveled to Florida a few days earlier, where they had purchased a kilogram of cocaine for resale in North Carolina. Petitioner made a telephone call to Marks, who agreed to meet with the officers and to cooperate in the investigation. Presentence Report 1-2.

2. The Presentence Report noted that petitioner was subject to a mandatory minimum sentence of ten years' imprisonment on the drug charges and a mandatory consecutive sentence of five years' imprisonment on the firearms charge. Presentence Report 7; see 21 U.S.C. 841(b)(1)(B); 18 U.S.C. 924(c). In the portion of the Report that calculated the applicable Sentencing Guidelines range, the probation officer recommended a two-level upward adjustment in petitioner's offense level for obstruction of justice, pursuant to Guidelines § 3C1.1. The probation officer found that petitioner had obstructed justice by writing a letter urging another man to make a false claim that he was the owner of the handguns found in petitioner's residence. Presentence Report 2. In the absence of a statutory minimum sentence, the Presentence Report concluded that the applicable Guidelines range for the drug offenses would be 97 to 121 months' imprisonment.[1] Because of the ten-year statutory minimum sentence, however, the Report concluded that the actual Guidelines range for that offense was 120 to 121 months. Presentence Report 7; see Guidelines § 5G1.1(c)(2).

[1] For the firearms offense, the Guidelines sentence was the same as the mandatory five-year term of imprisonment required by 18 U.S.C. 924(c)(1). Presentence Report 3; see Sentencing Guidelines § 2K2.4(a).

At the sentencing hearing, petitioner's counsel did not object to the Presentence Report's calculation of the Guidelines range. Petitioner's counsel specifically stated that he had "no objections" to the finding that an upward adjustment was warranted based on petitioner's obstruction of justice. J.A. 7. Counsel argued, however, that the district court should sentence petitioner to less than the ten-year statutory minimum sentence for the drug offense. Although the government had not filed a motion requesting a downward departure based on petitioner's cooperation, see 18 U.S.C. 3553(e); Guidelines § 5K1.1, petitioner's counsel argued that the court should nonetheless sentence petitioner to less than ten years' imprisonment on that count because of petitioner's cooperation with the government. J.A. 8-9. In support of that claim, petitioner's counsel proffered evidence that petitioner had sought to cooperate with the government after his arrest by meeting with federal agents and providing them with information about other drug traffickers. In response to the court's suggestion that he "state for the record * * * what the evidence would be," petitioner's counsel said:

> Other than the evidence, which is quite correct that's in the presentence report in paragraphs 9 and 10, the evidence would be that Mr. Wade met on, I believe, several occasions with Agent Deignan of the Drug Enforcement Administration, that he was of assistance in beginning an investigation which led to the arrest of an unrelated person, a person not in this conspiracy. That arrest and case is going on in state court now, and to my knowledge has not been resolved as of yet. Mr. Wade played an instrumental role in that case.

> And that, additionally, Mr. Wade has offered to cooperate further in that case. And that, additionally, he has provided other assistance in the nature of identification of other people suspected of drug crimes in the Middle District.

J.A. 10. The district court declined to sentence petitioner below the statutory minimum based on petitioner's cooperation, concluding that it lacked the authority to do so in the absence of a motion by the government. J.A. 9. The court then sentenced petitioner to the statutory minimum sentences on both the drug and firearms charges. J.A. 14, 18.

3. The court of appeals affirmed. J.A. 23-29. The court observed that there "appear[ed] to be no disagreement on the fact that shortly after his arrest and without the benefit of a plea agreement, [petitioner] began a course of cooperation which provided valuable assistance to the government in other prosecutions." J.A. 24. But the court concluded that "[t]he unambiguous language of 18 U.S.C. 3553(e) leads to the single conclusion that courts may not depart downward from mandatory minimum sentences because of the substantial assistance of the defendant unless the government files a motion for departure." J.A. 25. Consequently, the court of appeals rejected petitioner's argument that the district court was authorized to depart downward for his substantial assistance, even when the government has not filed a motion requesting such a departure. J.A. 26.

The court of appeals also rejected petitioner's argument that the district court should have examined evidence concerning the value of his assistance and the government's reasons for not filing a motion, in order to determine whether the government acted in

good faith. The court held that, because "the government has the sole discretion in deciding whether to file a motion for downward departure for substantial assistance, it follows that the defendant may not inquire into the government's reasons and motives if the government does not make the motion." J.A. 28. The court noted, however, that a defendant could take advantage of the provisions of 18 U.S.C. 3553 (e) and Guidelines § 5K1.1 by "negotiat[ing] a plea agreement with the government under which the defendant agrees to provide valuable cooperation [in exchange] for the government's commitment to file a motion for a downward departure." J.A. 28-29. Absent a plea agreement, however, the court held that "the defendant is not entitled to an explanation for the government's refusal to make the motion or its refusal to enter into an agreement to make the motion." J.A. 29.

SUMMARY OF ARGUMENT

Section 3553(e) of Title 18 provides that a sentencing court may depart below a statutory minimum sentence only "[u]pon motion of the Government." Sentencing Guidelines § 5K1.1 likewise permits the court to depart below the applicable Guidelines sentencing range if the government files a motion requesting such a departure. The plain language of both provisions makes clear that a departure for substantial assistance to the government may not be granted unless the government files a motion requesting such a departure. Moreover, the statute provides no standards for the prosecutor to apply in determining whether to file such a motion, indicating that the decision whether to file the motion is committed to the prosecutor's discretion.

The government's decision whether to file a "substantial assistance" motion is similar to other decisions committed to the prosecutor's discretion, such as whether to initiate charges, what charges to bring, and whether to enter into plea negotiations. Charging decisions have always been treated as matters of Executive prerogative that are not subject to judicial review. Challenges to such decisions have been permitted only where the prosecutor's conduct has violated the Constitution. Thus, unless the prosecutor's conduct is deliberately based upon an unjustifiable standard such as race, religion, or another unconstitutionally arbitrary classification, or is intended to punish the defendant for exercising a protected statutory or constitutional right, it is not subject to judicial scrutiny.

Petitioner concedes that courts may not ordinarily review the government's decision not to file a substantial assistance motion, and that review is available only in the case of alleged constitutional violations. While professing to acknowledge strict limitations on judicial review, however, he seeks to introduce a regime of extensive judicial review through the back door. Under the guise of seeking protection from unconstitutional arbitrariness, petitioner argues that a defendant must be permitted to litigate the question whether the government has treated him differently from other similarly situated defendants. He further argues that the government must demonstrate that it has not done so by explaining in detail why it has refused to file a substantial assistance motion in his case.

Not a shred of authority supports petitioner's suggestion that a defendant can obtain review of a prosecutor's exercise of discretion to file a substantial assistance motion on the ground that the prose-

cutor has failed to treat similarly situated defendants the same in a particular instance. As long as the prosecutor avoids acting on a constitutionally forbidden ground, his exercise of discretion is not subject to review.

There is no need or justification for a remand in this case to allow the district court to inquire into the prosecutor's reasons for refusing to file a substantial assistance motion. On this subject, as in the case of charging decisions, the prosecutor is presumed to act in good faith. Consequently, as petitioner himself concedes, a defendant is not entitled to discovery or a hearing unless he makes a substantial threshold showing that the prosecutor has acted on an unconstitutional basis.

Petitioner has made no showing whatever that the prosecutor's refusal to file a substantial assistance motion in his case was based on an unconstitutional motive or standard. Indeed, petitioner has not even alleged a constitutional violation. Petitioner's assertion that the district court refused to allow him to make a factual record on that issue is incorrect. To the contrary, the district court invited petitioner to make a proffer of evidence, and petitioner's proffer concerned only the extent and value of his assistance to the government. In effect, petitioner's argument is that the prosecutor was simply wrong in deciding that he did not offer substantial assistance in the investigation and prosecution of others. His request to the district court was for that court to examine the degree of his assistance and to override the prosecutor's decision that a substantial assistance motion was not called for in his case. But that is simply a request for plenary judicial review of the prosecutor's decision not to file a motion, which is

what petitioner concedes is not allowed. As the courts below properly concluded, the claim that petitioner made before the district court was not subject to judicial review.

ARGUMENT

PETITIONER WAS NOT ENTITLED TO A REDUCTION OF HIS SENTENCE BASED ON HIS CLAIM THAT HE PROVIDED "SUBSTANTIAL ASSISTANCE" TO THE GOVERNMENT

A. A Court May Grant A Reduced Sentence For Substantial Assistance Only If The Government Files An Appropriate Motion

Section 3553(e) of Title 18 provides that "[u]pon motion of the Government," a court shall have the authority to impose a sentence below the level otherwise required "so as to reflect a defendant's substantial assistance" in an investigation or prosecution. Sentencing Guidelines § 5K1.1 likewise authorizes a court to impose a sentence below the Guidelines sentencing range "[u]pon motion of the government stating that the defendant has provided substantial assistance" in the investigation or prosecution of another offender. The language of the two provisions is essentially identical, and they have therefore been construed similarly. See *United States* v. *Hayes*, 939 F.2d 509, 511 (7th Cir. 1991), cert. denied, 112 S. Ct. 896 (1992); *United States* v. *Gardner*, 931 F.2d 1097, 1099 (6th Cir. 1991); *United States* v. *Kuntz*, 908 F.2d 655, 657 (10th Cir. 1990); *United States* v. *Francois*, 889 F.2d 1341, 1344-1345 (4th Cir. 1989), cert. denied, 494 U.S. 1085 (1990).[2]

[2] The Court granted certiorari to review the question "[w]hether a Federal District Court has the power to review the United States Attorney's decision not to file pleadings pursuant to Section 5K1.1 of the Sentencing Guidelines." Pet. i. In his brief on the merits, however, petitioner addresses only the scope of judicial review of the prosecutor's refusal to file a motion under 18 U.S.C. 3553(e). See Pet. Br. 9. Petitioner explains (Pet. Br. 9 n.2) that he has "rephrased the question presented" because the Sentencing Commission recently requested public comment on a proposed amendment to Guidelines § 5K1.1 that would eliminate the government motion requirement for "substantial assistance" departures below the applicable Guidelines range. See 57 Fed. Reg. 112 (1992). But the Sentencing Commission has merely published the proposed amendment for comment. The proposal has not been endorsed or adopted by the Commission. See *id.* at 90 ("Publication of an amendment for comment does not necessarily indicate the view of the Commission or any individual Commissioner on the merits of the proposed amendment."). In any event, a proposal for an amendment to Guidelines § 5K1.1, even if endorsed by the Commission, would not alter the question on which this Court granted certiorari.

We agree, however, that because petitioner sought a sentence below the statutory minimum, both 18 U.S.C. 3553(e) and Sentencing Guidelines § 5K1.1 apply to this case. See Guidelines § 5K1.1, Application Note 1 (defendant's substantial assistance may justify sentence below statutory minimum "[u]nder circumstances set forth in 18 U.S.C. § 3553(e)"). Because a statutory minimum sentence automatically becomes the minimum Guidelines sentence if the minimum Guidelines sentence would otherwise be below the statutory minimum sentence, see Guidelines § 5G1.1(b), a downward departure would have required the court to depart from both the Guidelines range and the statutory minimum sentence. Consequently, we address both Section 3553(e) and Section 5K1.1.

By their terms, Section 3553(e) and Guidelines §5K1.1 permit a sentencing court to depart downward for substantial assistance only when the government makes a motion to that effect. Congress and the Sentencing Commission plainly stated their intent to condition a downward departure for substantial as-

sistance on the filing of a government motion. The caption of Section 3553(e) reinforces the plain language of the statute by emphasizing that the sentencing court has only "limited" authority to depart below the statutory minimum; that is, the court's authority is limited to cases in which the government files the requisite motion. The courts of appeals have agreed with that construction and have held that a motion by the government is a prerequisite to a sentence below the statutory minimum or a downward departure from the Guidelines sentencing range for substantial assistance.[3]

B. The Decision Whether To File A Substantial Assistance Motion Is Committed To The Prosecutor's Discretion

Petitioner concedes (Br. 12) that "the decision to seek a downward departure for substantial assistance is committed by statute to the discretion of the prosecutor." That concession is consistent with the text of Sections 3553(e) and 5K1.1, which place no limits on the prosecutor's decision to file a "substantial assistance" motion and contain no suggestion that that decision is subject to judicial review.

1. This Court's decisions under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, are instructive in analyzing whether a prosecutor's decision

[3] See *United States* v. *Long*, 936 F.2d 482, 483 (10th Cir.), cert. denied, 112 S. Ct. 662 (1991); *United States* v. *Alamin*, 895 F.2d 1335, 1337 (11th Cir.), cert. denied, 111 S. Ct. 196 (1990); *United States* v. *Coleman*, 895 F.2d 501, 504-505 (8th Cir. 1990); *United States* v. *Francois*, 889 F.2d at 1343; *United States* v. *Huerta*, 878 F.2d 89, 91 (2d Cir. 1989), cert. denied, 493 U.S. 1046 (1990); *United States* v. *Ayarza*, 874 F.2d 647, 653 (9th Cir. 1989), cert. denied, 493 U.S. 1047 (1990).

not to file a substantial assistance motion is subject to review in court. Judicial review of agency action is foreclosed under the APA if the statute in question indicates that a particular matter is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). See *Webster* v. *Doe*, 486 U.S. 592, 599-601 (1988); *Heckler* v. *Chaney*, 470 U.S. 821 (1985). A matter is "committed to agency discretion by law" if the statute in question "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. In that setting, the statute is drawn "in such broad terms that in a given case there is no law to apply." *Webster*, 486 U.S. at 599, quoting *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971)).

Section 3553(e) is such a statute. It has two parts. The second part, which is directed to the court, authorizes the court to grant a reduction in the defendant's sentence "so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The first part, which is directed to the government, simply provides that the court's action is contingent on the government's filing a motion permitting such a reduction. The statute does not condition the government's exercise of its discretion to file the motion in any way: it does not require that a motion be filed in the case of all defendants who provide substantial assistance; it does not suggest that a motion must be filed if the defendant has provided a particular kind or quality of assistance; and it certainly does not suggest that defendants who are unhappy with the government's decision not to file a motion will be entitled to review of the merits of that decision. In

short, the portion of Section 3553(e) that is directed to the government is written in such broad terms that "in a given case there is no law to apply."

The parallel provision of the Sentencing Guidelines likewise reflects an intention to commit the decision whether to file a motion to the government's discretion. Section 5K1.1 of the Guidelines provides that the court may depart if the government files a triggering motion "stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense." Like the statute at issue in *Webster* v. *Doe*, *supra*, which allowed termination of a CIA employee whenever the Director "shall *deem* termination necessary or advisable in the interests of the United States," 486 U.S. at 600, Guidelines § 5K1.1 "fairly exudes deference" to the government's decision. *Ibid.* The language of the Guideline, like the language of the statute, does not authorize a court to question whether the government correctly assessed the degree and quality of the defendant's assistance. Rather, it suggests that as long as the government recites that the defendant has provided such assistance, the court is authorized to grant (or refuse to grant) a reduction of sentence on that basis. There is no hint whatever that if the government declines to file such a motion, the court may second-guess that decision.[4]

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[4] A different issue is presented if the government enters into a plea agreement that requires the government to file a substantial assistance motion. In that case, the court may enforce the agreement or allow the defendant to withdraw his guilty plea. See *Santobello* v. *New York*, 404 U.S. 257, 262 (1971); *United States* v. *Conner*, 930 F.2d 1073, 1075 (4th Cir.) ("once the government uses its § 5K1.1 discretion as a bar-

2. The discretion accorded to the prosecutor by Congress and the Sentencing Commission in Sections 3553(e) and 5K1.1 is analogous to the "exclusive authority and absolute discretion" enjoyed by the government in determining whether to prosecute, see *United States* v. *Nixon*, 418 U.S. 683, 693 (1974), and what charges to bring, see *Ball* v. *United States*, 470 U.S. 856, 859 (1985); *United States* v. *Batchelder*, 442 U.S. 114, 124-125 (1979). This Court has said that judicial deference to the prosecutor's "broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." *Wayte* v. *United States*, 470 U.S. 598, 607 (1985); see *Town of Newton* v. *Rumery*, 480 U.S. 386, 396 (1987).

As the Court explained in *Wayte*, "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." 470 U.S. at 607. Moreover, the Court has recognized that judicial review of prosecutorial charging decisions "entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Ibid.* Because of these "substantial concerns," courts are "properly

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gaining chip in the plea negotiation process, that discretion is circumscribed by the terms of the agreement"), cert. denied, 112 S. Ct. 420 (1991).

hesitant to examine the decision whether to prosecute." *Id.* at 607-608.[5]

The prosecutor's decision whether to file a substantial assistance motion, like the decision whether to prosecute and what charges to bring, is not readily amenable to judicial review. In assessing the values of a particular defendant's cooperation, the prosecutor is likely to consider a variety of factors related to the defendant's assistance, including the quantity, quality, timeliness, completeness, and usefulness of that assistance in criminal investigations and prosecutions. In addition, the prosecutor may consider the degree of risk the defendant incurred by cooperating.

In evaluating those factors, the prosecutor is likely to draw on his experience with other defendants to

[5] Once charges have been filed, the decision whether to plea bargain is also committed to the discretion of the prosecutor. See *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); *Newman* v. *United States*, 382 F.2d 479, 480, 482 (D.C. Cir. 1967) (treating the decision whether to plea bargain as an aspect of the prosecutor's discretion to decide "when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought" and holding that "it is not the function of the judiciary to review the exercise of executive discretion.")

The courts have been similarly reluctant to review prosecutorial decisions to dismiss charges. Although under Fed. R. Crim. P. 48(a), the prosecutor may dismiss an indictment only with leave of court, the courts have emphasized that leave of court should be granted except in the most unusual circumstances. Thus, in applying Rule 48(a), the courts have recognized a presumption that the prosecutor acted in good faith and that his decision should be followed. See *United States* v. *Cowan*, 524 F.2d 504, 514 (5th Cir. 1975); *United States* v. *Ammidown*, 497 F.2d 615, 621 (D.C. Cir. 1973).

provide a basis for comparison. In addition, in deciding whether to file a motion, the prosecutor must balance the costs of seeking a lower sentence for one defendant against the potential benefits of encouraging cooperation by defendants generally. Because, as petitioner concedes (Br. 24), the prosecutor is "uniquely competent" to decide whether to file a substantial assistance motion, and because that decision turns on questions of law enforcement policy that are not well suited to judicial review, "[d]eciding whether to make a § 5K1.1 motion is fundamentally like deciding to prosecute on lesser charges persons who provide more assistance." *United States* v. *Smith*, No. 90-3606 (7th Cir. Jan. 14, 1992), slip op. 9. See *United States* v. *Grant*, 886 F.2d 1513, 1514 (8th Cir. 1989) (government motion requirement "is predicated on the reasonable assumption that the government is in the best position to supply the court with an accurate report of the extent and effectiveness of the defendant's assistance") (quoting *United States* v. *White*, 869 F.2d 822, 829 (5th Cir.), cert. denied, 490 U.S. 1112 (1989)); *United States* v. *Ayarza*, 874 F.2d at 653 ("it is rational for Congress to lodge some sentencing discretion in the prosecutor, the only individual who knows whether a defendant's cooperation has been helpful").[6]

[6] Amicus National Association of Criminal Defense Lawyers asserts (Br. 15) that the decisions whether to prosecute and what charges to bring are not analogous to the decision whether to file a substantial assistance motion, because "there are several layers of protection for a defendant between the charge and the sentence," such as indictment by a grand jury and trial by jury. But if there is an equally strong prima facie case against two individuals, the prosecutor's decision to bring lesser charges, or none at all, against one of them has a direct and substantial effect on the prospect of conviction and punish-

The legislative history of 18 U.S.C. 3553(e) underscores the close parallel between the prosecutor's charging decision and the decision to file a "substantial assistance" motion. The provision that became Section 3553(e) was proposed to Congress by the President as Section 504 of the Drug Free America Act of 1986, H.R. Doc. No. 266, 99th Cong., 2d Sess. (1986). The explanation that accompanied that provision stated:

> With the creation of mandatory minimum sentences, such as those established by this part for the most serious Controlled Substances Act violations, there is a need to provide an exception for defendants who cooperate to a substantial extent in the investigation or prosecution of others. Defendants would be unlikely to cooperate if they believed that despite their efforts they would be subjected to mandatory minimum prison terms. The prosecution of those at the highest levels of a drug ring, for example, would be practically impossible without the cooperation of other defendants. By providing authority for the sentencing court to sentence a defendant below a statutory minimum, this amendment allows for a defendant's record to reflect accurately his or her involvement in the crime charged, *rather than a less serious offense charged by the prosecutor to avoid mandatory minimum sentences.*

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ment. Indeed, the prosecutor's exercise of discretion at the charging stage will typically have a greater effect on the defendant than the exercise of discretion with respect to a substantial assistance motion, since a decision in the defendant's favor on substantial assistance merely results in a possible reduction in sentence, while a decision in the defendant's favor at the charging stage may make the difference between conviction and imprisonment on the one hand, and no criminal charges at all on the other.

Id. at 117-118 (emphasis added). See also 132 Cong. Rec. 21,964 (1986) (remarks of Sen. D'Amato) purpose of similar provision in earlier bill was "to provide our U.S. attorneys with the authority they need to obtain cooperation and information from drug dealers.")

These materials indicate that the purpose of the substantial assistance motion was to provide a means for prosecutors to obtain and reward cooperation by major offenders, which would otherwise require the prosecutors to manipulate the charging decision. Because the substantial assistance motion was designed as simply a more straightforward means of achieving the same end, there is no reason to believe that Congress intended to impose a stricter regime of judicial review for substantial assistance decisions than for charging decisions.

Judicial review of the basis for the prosecutor's refusal to file a substantial assistance motion, like judicial review of the prosecutor's decision whether to bring charges, would entail substantial systemic costs and pose serious problems of administration. Because "[d]efendants often estimate the value of their assistance, and the risks they have taken to provide it, more highly than does the prosecutor," *United States* v. *Smith*, slip op. 2, the prosecutor's decision not to file a substantial assistance motion would become an issue in a large number of cases in which the defendant cooperated with the government in some way. Moreover, a defendant would presumably be entitled to discovery to determine the basis for the prosecutor's decision, and to compare his case with other cases. Criminal proceedings would be slowed by the requirement of additional discovery and a hearing. And examination of the internal deliberative

process by which such prosecutorial decisions are made would often require that the prosecutor testify to explain his decision. The prosecutor would often be required to disclose details of the investigation of defendant's case, as well as other cases, to show that the defendant has not received less favorable treatment than other similarly situated defendants.[7] In addition to the burdens and disruption that would result, such disclosures could impede effective law enforcement and undermine the effectiveness of the substantial assistance provisions as a tool for encouraging cooperation by providing offenders with a "roadmap" of prosecutorial decisionmaking. Accordingly, the courts are properly hesitant to examine the prosecutor's decision not to file a substantial assistance motion.[8]

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[7] The commentary to Guidelines § 5K1.1 recognizes that judicial inquiry into a defendant's "substantial assistance" may result in the disclosure of information that could endanger the defendant or reveal an ongoing government investigation. See Guidelines § 5K1.1, Background (although district court must state reasons for reducing defendant's sentence under § 5K1.1, court may elect to provide reasons to defendant *in camera* or in writing under seal "for the safety of the defendant or to avoid disclosure of an ongoing investigation").

[8] Amicus National Association of Criminal Defense Lawyers challenges (Br. 4-19) the constitutionality of the government motion requirement on due process and separation of powers grounds. The petition did not present those issues, and they are therefore not properly before this Court. See Sup. Ct. R. 24.1(a). Indeed, petitioner himself expressly disclaims reliance on the arguments advanced by his amicus. Pet. Br. 20.

In any event, similar challenges have been rejected by every court of appeals that has considered them. See, *e.g.*, *United States* v. *Doe*, 934 F.2d 353, 356-358 (D.C. Cir.), cert. denied, 112 S. Ct. 268 (1991); *United States* v. *Harrison*, 918 F.2d 30, 33 (5th Cir. 1990); *United States* v. *Kuntz*, 908 F.2d 655, 657-658 (10th Cir. 1990); *United States* v. *Levy*, 904 F.2d at 1035-1036; *United States* v. *LaGuardia*, 902 F.2d 1010, 1013-1017 (1st Cir. 1990); *United States* v. *Lewis*, 896 F.2d 246, 249 (7th Cir. 1990); *United States* v. *Francois*, 889 F.2d at 1343-1345; *United States* v. *Grant*, 886 F.2d at 1513-1514; *United States* v. *Huerta*, 878 F.2d at 93-94; *United States* v. *Ayarza*, 874 F.2d at 653; *United States* v. *Musser*, 856 F.2d at 1487.

Amicus rests its due process argument on the erroneous assertion that defendants have a constitutionally protected liberty interest in receiving a reduced sentence for rendering substantial assistance to the government. But neither 18 U.S.C. 3553(e) nor 28 U.S.C. 994(n) (the statutory mandate for Guidelines § 5K1.1) places substantive limitations on the government's discretion to file a substantial assistance motion. Consequently, neither statute creates a protected liberty interest. See *United States* v. *Doe*, 934 F.2d at 360; see generally *Kentucky Dep't of Corrections* v. *Thompson*, 490 U.S. 454, 462-463 (1989) (statute creates a protected liberty interest by establishing "substantive predicates" that limit the discretion of officials). Nor do Section 3553(e) and Guidelines § 5K1.1 violate separation of powers principles. Sentencing "long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Mistretta* v. *United States*, 488 U.S. 361, 390 (1989). Prior to 1987, the Executive Branch shared sentencing responsibility with the courts through the parole system. The substantial assistance motion gives the Executive Branch even less control over sentencing than did the parole system, since after a "substantial assistance motion the court may always refuse to grant the reduction for which the prosecution has moved. Giving the prosecutor authority to trigger a downward departure for substantial assistance therefore does not exceed the Executive's permissible role in sentencing.

3. Contrary to petitioner's contention (Br. 13-15), the sentencing court's "inherent supervisory power" does not independently justify judicial inquiry into the prosecutor's reasons for not filing a substantial assistance motion. It is true that a federal court

"[i]n the exercise of its supervisory authority * * * 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.'" *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (quoting *United States* v. *Hasting*, 461 U.S. 499, 505 (1983)). But it is also "well established" that "[e]ven a sensible and efficient use of the supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions." *Bank of Nova Scotia*, 487 U.S. at 254 (quoting *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985)). In enacting 18 U.S.C. 3553(e), Congress assigned to the prosecutor the authority to determine whether to request a lower sentence on "substantial assistance" grounds. To permit the district court to second-guess the prosecutor's determination "would confer on the judiciary discretionary power to disregard the considered limits of the law it is charged with enforcing." *United States* v. *Payner*, 447 U.S. 727, 737 (1980). See also *Commissioner* v. *Asphalt Products, Inc.*, 482 U.S. 117, 121 (1987) (per curiam) ("Judicial perception that a particular result would be unreasonable * * * cannot justify disregard of what Congress has plainly and intentionally provided."); Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1516 (1984) (courts may not use supervisory power to "limit the constitutionally permissible exercise of prosecutorial discretion").[9]

[9] Contrary to petitioner's contention (Br. 14-15), judicial inquiry into the prosecutor's decision not to file a substantial assistance motion is not "necessary to preserve the integrity of federal criminal proceedings" or to "deter future illegal or improper conduct by prosecutors." As long as the prosecutor's exercise of his discretion is within constitutional limits, the decision not to file a substantial assistance motion is neither "illegal" nor "improper," and it therefore cannot threaten the integrity of the court's proceedings. See *United States* v. *Payner*, 447 U.S. at 736 n.8 (court may not exercise supervisory power "as a substitute for established" constitutional doctrine); Beale, 84 Colum. L. Rev. at 1508 ("where no provision of the Constitution, federal statutes or procedural rules has been violated, there is no significant threat to judicial integrity"). Cf. *Bank of Nova Scotia* v. *United States*, 487 U.S. at 264 (Scalia, J., concurring) (no basis for a court to exercise supervisory power to discipline prosecutors "except insofar as concerns their performance before the court and their qualifications to be members of the court's bar").

C. A Prosecutor's Decision Not To Make A Substantial Assistance Motion Is Subject To Challenge Only If It Violates The Constitution

While the prosecutor's decision whether to file a substantial assistance motion is not routinely subject to judicial review, that is not to say that it is entirely insulated from challenge. If the prosecutor's refusal to make a substantial assistance motion is based on a constitutionally invalid classification or otherwise violates a constitutional right of the defendant, a court can grant relief.

In the closely analogous context of the charging decision, the Court has said that "although prosecutorial discretion is broad, it is not 'unfettered.'" *Wayte*, 470 U.S. at 608. "Selectivity in the enforcement of criminal laws is * * * subject to constitutional constraints." *United States* v. *Batchelder*, 442 U.S. at 125). Thus, although "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962), the Equal Protection Clause (and the "equal protection component" of the Fifth

Amendment Due Process Clause, see *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954)) forbids selective enforcement that is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978); see *United States* v. *Batchelder*, 442 U.S. at 125 n.9. Similarly, a prosecutorial decision that is intended to punish a defendant for "exercising a protected statutory or constitutional right" violates the Due Process Clause. *United States* v. *Goodwin*, 457 U.S. 368, 372 (1982); see *id.* at 380 n.11 ("[a] charging decision does not levy an improper 'penalty' unless it results solely from the defendant's exercise of a protected legal right").

Permitting a defendant to advance constitutional claims despite the absence of a general right to judicial review is consistent with this Court's precedents regarding challenges to decisions that are "committed to agency discretion by law." Even when Congress has made it clear that it does not intend to permit judicial review of agency action, that does not bar challenges based on colorable constitutional claims. Rather, "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). See *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (requirement avoids "serious constitutional question of the validity of [a] statute" that precludes all judicial review of constitutional claims). Although Sections 3553(e) and 5K1.1 provide that a sentencing court shall have authority to depart downward for substantial assistance only upon motion of the government, there is no clear indication that Congress intended to preclude relief even if the government's conduct violates the Constitution. Consequently, the prosecutor's decision not to file a substantial assistance motion, like the decisions whether to prosecute and what charges to bring, may be challenged on the ground that the prosecutor has acted on the basis of race, religion, or some other unconstitutional criterion.

By the same token, however, judicial review of the prosecutor's decision not to file a substantial assistance motion should be no more extensive than judicial review of other matters committed to the prosecutor's discretion. See *United States* v. *Smith*, slip op. 8-9; *United States* v. *Romolo*, 937 F.2d 20, 24 n.4 (1st Cir. 1991); *United States* v. *Gonzales*, 927 F.2d 139, 145 (3d Cir. 1991); *United States* v. *Doe*, 934 F.2d 353, 361 (D.C. Cir.), cert. denied, 112 S. Ct. 268 (1991). Thus, there is no basis for petitioner's unexplained suggestion (Pet. Br. 24-25) that the sentencing court should determine whether the government's refusal to file a substantial assistance motion is "the result of 'bad faith' or 'arbitrariness' sufficient to constitute a substantive due process violation." Petitioner does not explain precisely what he means by "arbitrariness" or "bad faith." As the Seventh Circuit recently explained, "arbitrariness" refers generally to "unjustified disparities in the treatment of similarly situated persons." *United States* v. *Smith*, slip op. 3. "Bad faith," to the extent that it means something more than the prosecutor's consideration of a constitutionally forbidden characteristic such as race, appears to be nothing more than "an epithet that is attached to conduct that is substantively arbitrary." *Id.* at 8.

This Court has never held that "arbitrariness" is a basis on which to challenge an exercise of prosecutorial discretion. To be sure, the Court has said that a prosecutor's exercise of discretion "may not be

'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Wayte* v. *United States*, 470 U.S. at 608, quoting *Bordenkircher* v. *Hayes*, 434 U.S. at 364, quoting, in turn, *Oyler* v. *Boles*, 368 U.S. at 456. To the extent that the Court intended its reference to "other arbitrary classifications" to extend beyond constitutionally suspect classifications such as race and religion, the reference can apply only to the highly unlikely case in which the prosecutor classifies defendants according to factors that are not rationally related to whether they rendered substantial assistance. See *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). Absent evidence of such an irrational classification, however, a defendant's allegation that he provided useful assistance to the government is not sufficient to warrant judicial review of the prosecutor's decision not to move for a downward departure. If constitutionally cognizable "arbitrariness" were understood to mean simply the treatment of one defendant differently from others similarly situated, virtually any claim of "error" in the government's refusal to file a substantial assistance motion would be subject to judicial review.[10]

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[10] The lone decision petitioner cites (Pet. Br. 25) in support of his contention that discretionary decisions of the prosecutor are reviewable for "arbitrariness" or "bad faith," *United States* v. *Samango*, 607 F.2d 877 (9th Cir. 1979), does not support that proposition at all. In *Samango*, the court of appeals upheld the district court's dismissal of an indictment based on misconduct by the prosecutor during grand jury proceedings. Nothing in that decision suggests that either the district court or the court of appeals believed it had authority to review the government's charging decision to determine whether the prosecutor acted "arbitrarily" or in "bad faith." In any event, it is clear that the Ninth Circuit does not read its precedents as petitioner does, because that

To be sure, the sentencing process "must satisfy the requirements of the Due Process Clause." *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977) (plurality opinion). But petitioner's assertion (Br. 25) that unexplained sentencing disparities deny a defendant due process is mistaken. Outside the context of capital sentencing, the Court has rejected the argument that defendants are entitled to "an individualized determination that their punishment is 'appropriate.'" *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2701 (1991). See also *Chapman* v. *United States*, 111 S. Ct. 1919, 1928 (1991); *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989). When the prosecutor withholds a substantial assistance motion, the consequence is that the defendant receives the sentence that Congress and the Sentencing Commission determined to be appropriate for his offense and criminal history. That is all that due process requires. See *Chapman*, 111 S. Ct. at 1927-1929; cf. *Singer* v. *United States*, 380 U.S. 24, 36 (1965) (no "constitutional impediment" to conditioning defendant's waiver of jury trial on consent of prosecutor and trial court "when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury—the very thing the Constitution guarantees him").[11]

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court has recently held that the prosecutor's charging decisions are not subject to review for arbitrariness. *United States* v. *Redondo-Lemos*, No. 90-10430 (Feb. 5, 1992).

[11] Contrary to petitioner's suggestion (Pet. Br. 22-23), the Due Process Clause does not require that decisions committed to the discretion of the prosecutor be made by a "neutral and detached decisionmaker," even though those prosecutorial choices will surely "have a significant impact on [the] defendant's liberty." The prosecutor's charging decisions are

D. Petitioner Did Not Make The Substantial Threshold Showing Required To Challenge The Constitutionality Of The Prosecutor's Decision

Petitioner contends (Br. 28) that this case should be remanded to the district court with instructions to "consider[] * * * the reasons for [the] prosecutor's refusal to move for a downward departure." Petitioner is not entitled to a remand because he has made no showing that the prosecutor exercised his discretion in an unconstitutional manner.

"[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926). See also *United States* v. *Dotterweich*, 320 U.S. 277, 285 (1943). Accordingly, the courts of appeals agree that in order to obtain discovery or a hearing on a claim of selective or vindictive prosecution, the defendant bears the burden of producing evidence, not merely allegations, to support his claim that the prosecutor's motives were improper.[12] Petitioner

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not subject to such restrictions. And the prosecutor's authority under the substantial assistance provisions is only to *request* a lower sentence; the ultimate determination of the defendant's sentence is made by the district court, which is a "neutral decisionmaker." See *United States* v. *Levy*, 904 F.2d 1026, 1035 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991); *United States* v. *Musser*, 856 F.2d 1484, 1487 (11th Cir. 1988), cert. denied, 489 U.S. 1022 (1989).

[12] See, *e.g.*, *United States* v. *Heidecke*, 900 F.2d 1155, 1158-1160 (7th Cir. 1990); *United States* v. *Schoolcraft*, 879 F.2d 64, 67-69 (3d Cir.), cert. denied, 493 U.S. 995 (1989); *United States* v. *Hintzman*, 806 F.2d 840, 842 (8th Cir. 1986); *United States* v. *Jacob*, 781 F.2d 643, 646-647 (8th Cir. 1986); *United States* v. *Moon*, 718 F.2d 1210, 1229-1230 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984); *United States* v. *Gallegos-Curiel*, 681 F.2d 1164, 1167-1171 (9th Cir. 1982) (Kennedy, J.); *United States* v. *Torquato*, 602 F.2d 564, 569 (3d Cir.), cert. denied, 444 U.S. 941 (1979); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). Cf. *McCleskey* v. *Kemp*, 481 U.S. 279, 297 (1987) ("Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused.").

himself concedes (Br. 26) that there is a "strong presumption that prosecutorial action is taken in good faith," and a defendant must make "a substantial threshold showing in order to obtain discovery or an evidentiary hearing on allegations of prosecutorial misconduct."[13]

Petitioner has made no showing whatever that the government's refusal to request that he be sentenced below the statutory minimum was based on an unconstitutional standard such as the defendant's race, religion, or his exercise of a protected right. Indeed, petitioner has never even alleged such prosecutorial

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[13] The courts of appeals have applied somewhat different formulations of the threshold showing requirement. See, *e.g.*, *United States* v. *Heidecke*, 900 F.2d 1155, 1158-1160 (7th Cir. 1990) (to obtain discovery, a defendant must show a "colorable basis" for a claim of vindictive prosecution; to obtain a hearing, the defendant must "offer sufficient evidence to raise a reasonable doubt that the government acted properly"); *United States* v. *Hintzman*, 806 F.2d 840, 846 (8th Cir. 1986) (to obtain discovery, a defendant must establish a "prima facie" case of selective prosecution); *United States* v. *Greenwood*, 796 F.2d 49, 52 (4th Cir. 1986) (to obtain discovery on selective prosecution charge, defendant's allegations must raise "a legitimate issue" of government misconduct). There is no occasion in this case for the Court to decide which of these formulations is correct, because petitioner made no showing of any kind that the government exercised its discretion in an unconstitutional manner.

misconduct. Instead, petitioner merely urged the sentencing court to disregard the government's failure to file the required motion because he had in fact provided substantial assistance to the government. Because petitioner's objection to the government's refusal to file a substantial assistance motion rested solely on his disagreement with the prosecutor about the value of his cooperation, petitioner failed to make the threshold showing required to support a claim that the prosecutor's decision was based on an unconstitutional ground.[14]

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[14] There is no basis for entertaining a presumption that a prosecutor's refusal to file a substantial assistance motion is intended to penalize a defendant for exercising some constitutional or statutory right. In limited circumstances in which action detrimental to the defendant has been taken after the exercise of a legal right, the Court has applied such a presumption of unconstitutionality. See *Blackledge* v. *Perry*, 417 U.S. 21 (1974) (prosecutor's decision to file felony charges after defendant demands trial de novo on a misdemeanor charge); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969) (trial court imposes a harsher sentence following a successful appeal). But the Court has recognized that the presumption of vindictiveness "may operate in the absence of any proof of improper motive and thus may block a legitimate response to criminal conduct"; for that reason, the Court has declined to apply the presumption unless there is a "reasonable likelihood" of vindictiveness in a particular class of cases. *Goodwin*, 457 U.S. at 373; *Alabama* v. *Smith*, 490 U.S. 794, 799-802 (1989). There is no "reasonable likelihood" that a prosecutor will act out of vindictiveness in deciding whether to file a substantial assistance motion. The prosecutor has a strong interest in encouraging the cooperation of defendants and rewarding defendants who provide substantial assistance. The prosecutor's failure to make a substantial assistance motion on behalf of those defendants who have provided significant assistance to the prosecution is likely to impair the effectiveness of the prosecutor's efforts to persuade other defendants

In any event, the record discloses a wholly legitimate reason for the prosecutor's decision not to file a substantial assistance motion. Following petitioner's arrest, and during the same period that he purported to be cooperating with the government, petitioner wrote a letter to another man urging him to claim, falsely, that he was the owner of the guns found at petitioner's residence. See Presentence Report 2; Pet. Br. 3-4 n.1. Because of that conduct, the Presentence Report recommended that petitioner's offense level be increased for obstruction of justice, and petitioner's counsel stated at the sentencing hearing that the "finding[s] on both obstruction of justice and acceptance of responsibility are correct." J.A. 7. It is certainly rational for a prosecutor to require a defendant who is seeking a reduction in sentence for substantially assisting in the investigation or prosecution of other individuals to be truthful about the circumstances of his own offense and the involvement of others in that offense.

Petitioner nevertheless contends that a remand is necessary "[b]ecause the District Court in this case refused to entertain any inquiry whatsoever into the reasons for the prosecutor's failure to file the motion," and because "there is neither a finding below nor a factual record on that issue." Br. 27 n.19. Petitioner also argues that "the absence of any evidence in the record that the prosecutor's motives were improper * * * is not due to petitioner's in-

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to cooperate. See *United States* v. *Doe*, 934 F.2d at 358; *id.* at 362 (Ginsburg, J., concurring); *LaGuardia*, 902 F.2d at 1016; *Lewis*, 896 F.2d at 249; *Huerta*, 878 F.2d at 93. Petitioner therefore cannot meet his burden of establishing a likelihood of unconstitutional conduct by relying on a presumption that the prosecutor acted vindictively in his case.

ability to produce it, but to the District Court's refusal to entertain any allegations of prosecutorial misconduct, much less any evidence to support such allegations." Br. 27 n.20 (citing J.A. 10).

Petitioner's contentions are unpersuasive. First, as petitioner himself concedes (Br. 26), the district court should not inquire into the government's reasons for refusing to file a substantial assistance motion absent a threshold showing by the defendant that the government has exercised its discretion in an unconstitutional manner. Petitioner made no such showing; consequently, the district court was correct not to inquire into the prosecutor's motives or to make any findings on that issue. Second, petitioner's assertion that the district court "refus[ed] to entertain any allegations of prosecutorial misconduct" (Br. 27 n.20) is simply incorrect. The district court expressly invited petitioner's counsel to "state for the record * * * what the evidence would be." J.A. 10. Petitioner proceeded to make a proffer of evidence that concerned only the extent of his cooperation. J.A. 10-11. Petitioner's proffer contained nothing to suggest that the prosecutor's decision not to file the motion was based on unconstitutional considerations. *Ibid.* Petitioner has not made the substantial threshold showing that he himself concedes is necessary to justify judicial inquiry into the prosecutor's reasons for not filing a substantial assistance motion. Accordingly, the courts below properly rejected his claim.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45338

No. 91-5771

In The

Supreme Court of the United States

October Term, 1991

HAROLD RAY WADE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The government argued before the Court of Appeals that the District Court had no power whatsoever to inquire into the reasons behind the prosecutor's refusal to make a substantial assistance motion.[1] The government took the same position in its Brief in Opposition to the Petition for Certiorari,[2] and in briefs opposing certiorari in at least five other cases presenting the same issue.[3] Yet in a remarkable about-face that is tantamount to a confession of error, the government now concedes (Resp. Br. 8, 23-27) that the prosecutor's decision not to file a substantial assistance motion *is* subject to judicial review, just as petitioner contends, when the prosecutor's conduct is alleged to violate the Constitution.

Having thus conceded away the central issue in this case, the government is now reduced to quarreling about

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[1] *See, e.g.*, Brief for the United States in *United States v. Wade* (4th Cir. No. 90-5805), at 6-10 ("There is no basis . . . for defendant's argument that the sentencing court may order the government to justify its decision to forego making a [substantial assistance] motion.").

[2] *See, e.g.*, Cert. Opp. at 6 ("[T]he government's decision not to file a 'substantial assistance' motion is not subject to judicial review.").

[3] *See, e.g.*, Briefs for the United States in Opposition to Petitions for Certiorari in *Huerta v. United States* (No. 89-5689); *Francois v. United States* (No. 89-6720); *Rexach v. United States* (No. 90-5212); *Sutton v. United States* (No. 90-5952); and *Chotas v. United States* (No. 90-6727).

the specific grounds on which the prosecutor's substantial assistance decision may be reviewed.[4] To camouflage this full-scale retreat, the government resorts to such disingenuous devices as distorting petitioner's position on the grounds for review and making inflammatory references to the "red herring" of obstruction of justice. Petitioner is confident that this Court will not allow these diversionary tactics to obscure the real issues in this case.

I. The Prosecutor's Substantial Assistance Decision Must Be Reviewable For "Bad Faith" Or "Arbitrariness."

The government now concedes (Resp. Br. 23-24) that the prosecutor's substantial assistance decision is subject to challenge on two of the three grounds described by petitioner: that it is deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, and that it is intended to punish the defendant for exercising a protected statutory or constitutional right. The government objects, however, to petitioner's third ground for review: that the prosecutor's decision is

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[4] The structure of the government's brief vividly illustrates the magnitude of its retreat. The government spends 15 pages of its 22-page argument discussing issues on which there is no disagreement: (i) that § 3553(e) makes a government motion a prerequisite to a downward departure for substantial assistance (Resp. Br. 10-12); (ii) that the decision whether to file a substantial assistance motion is committed by statute to the prosecutor's discretion (Resp. Br. 12-22); and (iii) that the prosecutor's decision not to make a substantial assistance motion is subject to judicial review when it is alleged to violate the Constitution (Resp. Br. 23-24).

the result of bad faith or arbitrariness sufficient to constitute a due process violation. The government contends that allowing review for "bad faith" or "arbitrariness" will "introduce a regime of extensive judicial review through the back door," by forcing the prosecutor to justify his substantial assistance decision whenever the defendant can show that he has been treated differently than other similarly situated defendants. (Resp. Br. at 8-9, 25-26).

The government's parade of horribles is based on a serious misrepresentation of petitioner's position. Contrary to the government's assertion (Resp. Br. 25-26), petitioner has never maintained that the sort of "bad faith" or "artibrariness" which the Due Process Clause forbids means "simply the treatment of one defendant differently from others similarly situated." Indeed, as the government acknowledges (Resp. Br. 25), petitioner's brief does not define either of these terms. The government nonetheless uses this definition to assert that permitting review for "bad faith" or "arbitrariness" will force the prosecutor to justify his failure to make a substantial assistance motion whenever the defendant can show that the prosecutor has made such motions for other similarly situated defendants (Resp. Br. 8-9, 25-26).

The government's argument is disingenuous at best. Petitioner has never endorsed the government's rather unusual definition of "in bad faith" or "arbitrary," and he does not do so now.[5] To the contrary, petitioner uses

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[5] The government's definition is apparently drawn from *United States v. Smith*, 953 F.2d 1060 (7th Cir. 1992), a decision that petitioner has neither cited nor endorsed.

these terms as they have always been used in this Court's due process jurisprudence: to mean based on factors that are not rationally related to any legitimate state objective – *e.g.*, a personal grudge against the defendant, a desire to advance the prosecutor's own political career, or the outcome of a coin toss. The government's assertion (Resp. Br. 25) that this Court has never allowed an exercise of prosecutorial discretion to be challenged on such grounds is flatly incorrect: a long line of this Court's decisions establish that the federal courts may enjoin a state prosecutor's "bad faith" decision to initiate criminal charges. *See, e.g., Moore v. Sims,* 442 U.S. 415, 432 (1979); *Perez v. Ledesma,* 401 U.S. 82, 85 (1971); *Younger v. Harris,* 401 U.S. 37, 47-54 (1971); *Dombrowski v. Pfister,* 380 U.S. 479 (1965).[6] If a showing of prosecutorial bad faith will permit a federal court to interfere with prosecutorial discretion in this most drastic manner, it will surely permit a federal court to take the infinitely less intrusive step of requiring the prosecutor in a federal criminal proceeding pending before it to explain why he has failed to move for leniency. Fidelity to the constitutional guarantee of due process requires that the prosecutor's substantial assistance decisions be subject to challenge on this basis. *Cf. Chapman v. United States,* ___ U.S. ___, 111 S.Ct. 1919, 1927 (1991) (basing sentencing decisions on "arbitrary" factors is a violation of the defendant's due process rights).

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[6] *See also Shaw v. Garrison,* 467 F.2d 113 (5th Cir.), *cert. denied,* 409 U.S. 1024 (1972) (enjoining prosecution brought for the purpose of advancing the prosecutor's own financial interests); *Pizzolato v. Perez,* 524 F.Supp. 914 (E.D. La. 1981) (enjoining prosecution brought to coerce defendant into dropping his pending libel action against the prosecutor).

Allowing defendants to challenge the prosecutor's substantial assistance decision for "bad faith" or "arbitrariness" will not, as the government asserts (Resp. Br. 26), mean that prosecutors will have to justify virtually every decision not to file such a motion. For years, the federal courts have prevented claims of discriminatory or vindictive prosecution from being too readily asserted by requiring a defendant to make a strong prima facie showing of unconstitutional behavior in order to earn even the right to an evidentiary hearing on such a claim. *See* 2 W. LaFave & J. Israel, *Criminal Procedure* §§ 13.4 & 13.5 (1984). The number of "bad faith" or "arbitrariness" challenges to the prosecutor's substantial assistance decision can be kept within reasonable bounds in the same fashion. Indeed, these procedural hurdles should prove even more effective in this context, because it is generally more difficult to prove unconstitutional "arbitrariness" than to prove discriminatory or vindictive animus. A strong presumption of good faith behavior and a stiff prima facie case requirement, rather than a total ban on review, is the way to discourage frivolous claims of "bad faith" or "arbitrary" prosecutorial behavior without sacrificing defendants' constitutional rights.

II. 18 U.S.C. § 3553(e) Does Not Abrogate The District Court's Inherent Power To Ensure That The Prosecutor Exercise His Substantial Assistance Discretion Within Constitutional Limits.

Contrary to the government's suggestion (Resp. Br. 21-22), 18 U.S.C. § 3553(e) does not abrogate the District Court's inherent power to demand that the prosecutor

exercise his substantial assistance discretion within constitutional limits. It is of course true that Congress may limit the inherent supervisory power of the lower federal courts by statute or rule. *See Chambers v. NASCO, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 2134 (1991); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988). But 18 U.S.C. § 3553(e) does not expressly forbid the federal courts to exercise their inherent supervisory power in this fashion, and this Court has always been reluctant to infer Congressional intent to limit that power from ambiguous statutory language. *See Chambers*, ___ U.S. at ___, 111 S.Ct. at 2134 ("we do not lightly assume that Congress has intended to [limit] . . . the scope of a court's inherent power"). This Court should be even more reluctant to infer such a limitation where, as here, the limitation suggested would raise serious constitutional problems. *See* Pet. Brief at 18-23.

III. Petitioner Is Entitled To A Remand.

The government argues that even if petitioner is correct on the reviewability question, he is not entitled to a remand because he failed to make the threshold showing necessary to obtain a full evidentiary hearing on his claim of prosecutorial misconduct. (Resp. Br. 28) (asserting that petitioner was required to "produc[e] evidence, not merely allegations, to support his claim that the prosecutor's motives were improper").[7] This argument is wholly

[7] The government's suggestion that petitioner "has not even alleged a constitutional violation" (Resp. Br. 9) is utterly

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without merit. Petitioner did not make the requisite threshold showing because the District Court did not allow him to do so. After deciding that it had no authority to entertain petitioner's challenge to the prosecutor's substantial assistance decision, the District Court refused to allow petitioner's counsel to put forth any evidence supporting that challenge (J.A. 9-10).[8] The Fourth Circuit

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without merit. Petitioner has maintained throughout this litigation that the prosecutor acted "arbitrarily" and "in bad faith" in refusing to make a substantial assistance motion. *See* J.A. 24 (petitioner "sought unsuccessfully to inquire of the government why it refused to make the motion," in order "to resolve whether the government acted arbitrarily or in bad faith"). Such "bad faith" or "arbitrariness" is the very essence of a due process violation. The fact that petitioner has not always mentioned the Due Process Clause in the same breath as these terms is of no moment; this Court has never held that a party must cite chapter and verse in making a constitutional claim, so long as the basis of that claim is clear. *Cf. Picard v. Conner*, 404 U.S. 270, 278 (1971).

[8] Though the Court allowed petitioner to "state for the record . . . what the evidence would be," (J.A. 10), it did not allow him actually to put on evidence, nor did it allow him to explain the basis for his challenge to the prosecutor's decision. When petitioner's counsel asked the Court whether it would "be appropriate for me to put on evidence at this point, or are you ruling basically on my grounds for making this [request]," the Court responded, "I'm ruling on your grounds." *Id.* When petitioner's counsel complained that he was "being cut off before I get to that point," the Court agreed: "That's what I'm saying. You may appeal on my ruling." *Id.*

The fact that petitioner's counsel used his limited proffer to explain the assistance petitioner had provided does not mean that his "objection to the government's refusal to file a

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affirmed on the ground that District Court had no authority to inquire into the reasons for the prosecutor's decision (J.A. 26-28). If this Court reverses the Fourth Circuit on that point, it must remand the case to give petitioner a chance to make the threshold showing necessary to obtain an evidentiary hearing on his claim, a chance the lower courts denied him. To hold that the Fourth Circuit's error on the reviewability question was "harmless" because petitioner did not make a threshold evidentiary showing he was never given an opportunity to make would be manifestly unfair.

The government's argument that petitioner is not entitled to a remand because his alleged obstruction of justice was "a wholly legitimate reason for the prosecutor's decision not to file a substantial assistance motion" (Resp. Br. 31) is similarly without merit. Because the District Court did not allow petitioner to inquire into the reasons for the prosecutor's decision not to make the motion, it is impossible to determine whether the alleged obstruction of justice was in fact the real reason for that decision. The government's reference to the alleged obstruction of justice is nothing more than a transparent resort to the age-old strategy of arguing inflammatory facts when the law is not on one's side.

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substantial assistance motion rested solely on his disagreement with the prosecutor about the value of his cooperation." (Resp. Br. 30). A showing that substantial assistance was in fact rendered is obviously an essential element of any claim that the prosecutor has refused to make a substantial assistance motion for an unconstitutional reason.

CONCLUSION

For the reasons given above, together with those set forth in Petitioner's initial brief, the judgment of the Court of Appeals should be reversed, and the case remanded for further consideration of petitioner's claim.

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